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Sup Ct.

Vol. I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 95

AIRCRAFT & DIESEL EQUIPMENT CORPORATION,
APPELLANT,

vs.

MAURICE HIRSCH, E. D. McDOUGAL, JOHN R. PAUL, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

FILED MAY 1, 1946.

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VOL. I

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[fol. a] [Caption omitted]

[fols.1-81]

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 28999

AIRCRAFT & DIESEL EQUIPMENT CORPORATION, a Corporation, 4401 North Ravenswood Avenue, Chicago, Illinois, Plaintiff

vs.

MAURICE HIRSCH, Room 3D-624 Pentagon Building, Washington, D. C.; W. JOHN KENNY, Room 102-718 18th Street, Washington, D. C.; JOHN R. PAUL, Room 512-1200 15th Street, Washington, D. C.; H. C. MAULL, JR., 5404 Procurement Building, 7th Street, S.W., Washington, D. C.; GLADDING B. COIT, 811 Vermont Avenue, N.W., Washington, D. C.; CARMAN B. BLOUGH, Department 1400 of War Production Board, Fourth Street and Independence Avenue, S.W., Washington, D. C., As members of and purporting to constitute a purported agency of the United States of America, The War Contracts Price Adjustment Board; HENRY L. STIMSON, Secretary of War, 3000 Cathedral Avenue, Washington, D. C., As Secretary under the provisions of the Renegotiation Act, and ROBERT P. PATTERSON, Under Secretary of War, 1545 35th Street, N.W., Washington, D. C., As delegate of the War Contracts Price Adjustment Board or as delegate of Henry L. Stimson, Secretary of War, or both, Defendants.

[fol. 82] [File endorsement omitted]

[Title omitted]

MOTION FOR PRELIMINARY INJUNCTION—Filed May 19, 1945

Now comes Aircraft & Diesel Equipment Corporation, plaintiff in the above-entitled cause, by its attorneys below-named, and moves the Court:

1. For a preliminary injunction against the defendants and each of them, their servants, agents, assistants, depu-

ties, employees and attorneys and all persons acting or assuming to act under their direction enjoining and restraining them, until further order of this Court from:

(A) Instructing or requesting any customer of plaintiff or person who has contracted with plaintiff to withhold any moneys due or to become due to plaintiff from such customer or person;

(B) Proceeding in any manner, directly or indirectly, to enforce or attempt to enforce the determination and order of January 11, 1945; an application to review which was denied, and which became final on to-wit May 3, 1945, either by the methods of enforcement sought to be provided by said Renegotiation Act, or by any other method; or from in any way hindering, obstructing, interfering or intermeddling with any of the business or transactions of plaintiff or otherwise, to obstruct, harass, or interfere with the plaintiff in the free and unhampered carrying on, operation and conduct of its said business.

[fols. 83-91] 2. That such preliminary injunction be continued in force until further hearing and determination of this cause and until determination by the Tax Court of the United States of the plaintiff's liability under the Renegotiation Act.

3. That upon final hearing of this cause a permanent injunction herein be issued.

As grounds therefor, plaintiff states that this motion is made upon the grounds of the facts set forth in plaintiff's verified complaint on file herein and for the reason that, as applied to plaintiff or its business, said Renegotiation Act is unconstitutional and void as being unauthorized and violative of the Constitution of the United States and upon the fact that unless the defendants are restrained pending the determination by this Court of the constitutionality of the Renegotiation Act, the constitutionality of the Renegotiation Act as applied to this plaintiff, and the determination of plaintiff's petition for redetermination of alleged excessive profits by the Tax Court of the United States from proceeding to enforce said Unilateral Determination set forth in plaintiff's verified complaint that plaintiff will suffer irreparable injury for which it has no plain, speedy or adequate remedy at law.

This motion is made and based upon all of the pleadings, papers, records, and files in this action.

Gallagher, Rincker, Wilkinson & Hall, By Arthur R. Hall, 231 S. LaSalle Street, Chicago 4, Illinois; Hill & Crenshaw, By Francis W. Hill, Jr., Woodward Building, Washington 5, D. C., Attorneys for Plaintiff.

Served a copy of the within above motion notice on within named defendants Henry L. Stimson, Secty. War; Robert P. Patterson, Under Secty. War, both by serving Col. M. G. White, J. A. G. office, personally 5-19-45.

C. Michael Kearney, U. S. Marshal in and for the District of Columbia, By Edgar J. McCloy, Jr., Deputy U. S. Marshal.

U. S. Marshal's Fee—$4.00.

[fol. 92] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTIONS TO DISMISS THE COMPLAINT AND FOR SUMMARY JUDGMENT—Filed June 11, 1945

Come now the defendants by their attorneys herein and move the Court to dismiss the complaint on the grounds that:

(1) the Court lacks jurisdiction over the subject matter of the action;

(2) the complaint fails to state a claim against the defendants upon which relief can be granted;

(3) the complaint fails to state a claim for declaratory judgment or for injunctive relief;

(4) the Court lacks jurisdiction to consider in this case any issue as to the amount, if any, of excessive profits realized by plaintiff.

In the alternative defendants move for summary judgment on the grounds set forth above and on the further

ground that there is no genuine issue as to any material fact and defendants are entitled to judgment as a matter of law.

[fol. 93] These motions are based upon the affidavits attached hereto and the pleadings, files and records in this case.

Dated: June 11, 1945.

(s) Francis M. Shea, Assistant Attorney General; Edward M. Curran, United States Attorney, Attorneys for Defendants.

Of Counsel: Arnold Levy, Special Assistant to the Attorney General; Walker Lowry, A. Morris Kobrick, Attorneys, Department of Justice.

[fol. 94] [File endorsement omitted]

In United States District Court

[Title omitted]

Affidavit of Robert P. Patterson—Filed June 11, 1945

[fol. 95] Robert P. Patterson, being duly sworn, deposes and says:

1. I am Under Secretary of War of the United States and have held that office, which was created by the Act of December 16, 1940, 54 Stat. 1224, since December 19, 1940. From July 30, 1940 to December 19, 1940 I was The Assistant Secretary of War.

2. By authority of various statutes and by various delegations of authority from The Secretary of War, I am, and have been both as Under Secretary and as The Assistant Secretary of War, charged with the supervision of the procurement of all military supplies and of other business of the War Department and the Army pertaining to production and procurement.

3. The statements made in this affidavit are based upon information acquired by me in my official capacity and which I believe to be true and accurate.

Preliminary Statement

4. Wartime procurement for the military establishment differs radically from procurement in times of peace. Speed in production at once becomes all-important. Industry is called upon to produce an entire complex of new products, constantly changing in design and purpose. Quantities of both old and new products, far beyond those previously manufactured, are suddenly demanded, and in the shortest possible time. For the production of these needed items, [fol. 96] existing plants, machinery and equipment have to be converted from producing peacetime civilian goods to meet the different and expanded needs of the armed forces. Even the marginal producers have to be used in order to meet these needs. In addition, hundreds of new plants, new machinery and new equipment have to be constructed, installed, and put to work. The nation's manpower has to be reallocated, almost overnight, to adjust to the gaps caused by the transfer of millions from production to the armed forces, and to the springing up of new industries and new areas of production. Enormous dislocations in transportation, and in the supply of raw materials have to be ironed out.

5. The necessary result of this combination of circumstances is that the war procuring agencies cannot use normal methods of procurement. The pressing need for speed requires the abandonment of drawn-out negotiation and the careful surveys of all relevant factors which sound purchasing would otherwise require. Competition necessarily wanes and no longer offers an adequate guide to the prices which should be paid. Above all, the forecasting of costs of production becomes, in large measure, a matter of informed guessing rather than of real cost analysis. This is true in the case of new products, new plants, and new producers; it is likewise true, though perhaps in lesser degree, wherever the quantities to be manufactured are sharply increased over pre-war amounts. Accordingly, advance prices quoted in good faith by manufacturers in a large number of cases have little relation to costs actually experienced in the course of production. Furthermore, many manufacturers feel unable to quote firm prices without including reserves to cover many contingencies the occurrence of which

[fol. 97] might skyrocket their costs, and so overturn all their estimates.

6. These were the conditions of wartime procurement, after December 7, 1941, and the War Department had to force its procurement activities into their mold. Efforts were made, of course, to develop contractual devices which would minimize the paramount difficulty in estimating production costs. The cost-plus-fixed-fee contract was used where unavoidable, but this form has the disadvantage of removing financial incentives to efficiency and of imposing a heavy burden of auditing upon the Government and the contractor. Escalator clauses, permitting prices to be adjusted according to fluctuations in indices of labor and material costs, were also used but proved unworkable. Letters of intent, under which manufacture was commenced prior to the negotiation of a formal contract, helped to speed production, but could not, of course, solve the ultimate problem of decreasing costs and preventing excessive profits.

7. Shortly after the declarations of war, both the legislative and the executive branches of the Government realized that excessive wartime profits were certain to accrue unless counter measures were taken. The evil effect of such wartime excessive profit on the morale of the fighting forces and the civilian population, as well as the unnecessary financial burden upon the Government, could not be ignored. The example of the last war was still fresh. Many war contractors realized the dangers and inequities resulting from such excessive profit, and some of them made refunds of excessive profits or voluntarily reduced their prices. In the spring of 1942, the War Department developed cost analysis units to check, so far as practicable, on production costs, and set up a price adjustment board to negotiate with [fol. 98] contractors for voluntary price reductions and refunds of past payments. Tentative policies as to what profits were excessive were established and meetings with contractors had. At the same time, there came into use contract clauses providing for the renegotiation or redetermination of contract prices after an initial period of production had laid a basis for the proper estimation of costs. We hoped that these means would keep incentives to efficiency alive and at the same time would tend to eliminate undue profits such as were then coming to light.

8. The Congress apparently felt, however, that these contractual measures, resting as they did upon the voluntary cooperation of a relatively small number of war contractors, did not provide enough certainty that excessive profits would be eliminated. The Vinson-Trammel Act, limiting profits on aircraft and ship construction, had been repealed in 1940, but an effort was made to revive it. In March, 1942, the War Department and the War Production Board opposed such legislation on the ground that a flat percentage profit limitation would impede production and would be unfair to many contractors and too generous to others. After the Case amendment imposing such a flat percentage limitation on profits from war contracts had been adopted by the House of Representatives late in March, 1942, the armed services and the War Production Board offered a substitute proposal giving statutory authority to the process of voluntary renegotiation which had been developing. Congress adopted the principle of renegotiation with which the armed services were in accord (rather than the principle of a flat percentage limitation of profits), and it also endowed the procuring agencies with power to determine [fol. 99] excessive profits when no bilateral agreement could be reached with the contractor. I believe that this addition by the Congress of the power of unilateral action was a wise and a necessary one, and that without it renegotiation would not have accomplished anything like the results that have been achieved.

9. The purpose of this affidavit is to present the facts showing in greater detail, (a) the nature and extent of the procurement problems of the Army after the declaration of war, (b) the need for renegotiation and limitation of profits of war contractors and the steps which had been taken in that direction prior to the enactment of the renegotiation statute, and (c) what statutory renegotiation has accomplished.

The Army's Procurement Problems Subsequent to the Declaration of War

10. Immediately after the attack on Pearl Harbor, on December 7, 1941, the War Department's procurement program was sharply accelerated to meet the new requirements imposed upon the country and the Army by the sudden involvement of the United States in the war. The

defense procurement program had been large, but the effort was minor in comparison with that necessitated by the demands of active warfare. Supplies, equipment, housing, ammunition, and weapons had to be secured, in the least possible time, for our rapidly expanding armed forces, and for the anticipated needs of a war to be fought on two sides of the globe. In addition, increased supplies for the nations with which we were allied had to be produced with the greatest possible speed. All phases of procurement were stepped up: production of the weapons of war, such as guns, planes, tanks; construction and equipping of camps; procurement of equipment and supplies for the troops; construction of plant facilities; production of the [fol. 100] means of communication and transportation.

11. The extent of the problem facing the procurement agencies can be judged from the goals set by the President in his message to Congress of January 6, 1942. The President stated:

> I have just sent a letter of directive to the appropriate departments and agencies of our government ordering that immediate steps be taken:
>
> First to increase our production rate of airplanes so rapidly that in this year 1942 we shall produce 60,000 planes, 10,000 by the way, more than the goal that we set a year and a half ago. This includes 45,000 combat planes, bombers, dive bombers, pursuit planes. The rate of increase will be maintained, continued, so that next year, 1943, we shall produce 125,000 planes, including 100,000 combat planes.
>
> Secondly, to increase our production rate of tanks so rapidly that in this year, 1942, we shall produce 45,000 tanks, and to continue that increase so that next year, 1943, we shall produce 75,000 tanks.
>
> Third, to increase our production rate of antiaircraft guns so rapidly that in this year, 1942, we shall produce 20,000 of them, and to continue that increase so that next year, 1943, we shall produce 35,000 antiaircraft guns.
>
> And fourth, to increase our production rate of merchant ships so rapidly that in this year, 1942, we shall build 8,000,000 deadweight tons, as compared with a 1941 completed production of 1,100,000. And finally,

we shall continue that increase so that next year, 1943, we shall build 10,000,000 tons of shipping.

Illustrative of the tremendous undertaking facing both American industry and the procurement agencies is the fact that the total number of planes (military, commercial, and private) produced from 1903 to 1940 was some 33½ [fol. 101] percent less than the number scheduled for the year 1942 alone, and that procurement of planes for the Army during 1942 was over 250% greater than in 1941. For the fiscal year ending June 30, 1942, the money appropriated for War Department procurement and construction was more than six times the amount appropriated in the fiscal year 1941. One-third of the total was appropriated by the Congress in the first half of the fiscal year 1942, before the United States had been attacked; after Pearl Harbor, the Congress tripled the new procurement funds made available earlier in the fiscal year.

12. To fulfill the requirements of this expanded war program, a vast number of contracts had to be made, as quickly as possible, for supplies, weapons, and munitions of all kinds. Attached as Exhibit A is a chart (based on information furnished by the War Production Board) showing the number and dollar value of contracts for all types of war materials entered into each month from July 1941 through June 1942 by the various procuring agencies. The tremendous increase which occurred in January 1942 and continued through the remaining months of that fiscal year is clearly shown by this chart. In November, 1941, the total dollar value of such contracts was $1,506,000,000; in December it jumped to $3,131,000,000; and in January 1942 to $9,456,000,000; in the remaining months of the fiscal year it never fell below $4,800,000,000. The chart, it should be noted, understates both the total number of contracts and their total dollar value, since it excludes (1) contracts with a value of less than $50,000 (of which there were a vast number), (2) contracts for subsistence, and (3) construction contracts. An idea of the comparison between the total number of contracts entered into by the War Department prior to Pearl Harbor and thereafter can be gained from [fol. 102] the fact that the number of contracts for the fiscal year ending June 30, 1941, was 667,364, while that for the four months of July, August, September, and Octo-

ber 1942 alone was 1,408,141. All these figures concern only prime contracts, but the vast stimulating effect of this expanded volume of prime contracts upon subcontracting of all tiers is readily apparent. On December 31, 1941, War Department obligations for supplies and new capital facilities amounted to more than 9 billion dollars, but on June 30, 1942, they amounted to nearly 43 billion dollars. War Department expenditures for delivered supplies were nearly 4 billions on December 31, and were more than 13 billions on June 30. In the last six months of the fiscal year ending June 30, 1942, War Department contractual activity and the delivery of supplies were four times greater than in the first six months. Some conception of the vast scope of the procurement activity of the armed services after the attack on Pearl Harbor can be gained from the fact that the total expenditures of the War and Navy Departments for the one fiscal year ending June 30, 1942 ($22,905,000,000) considerably exceeded the total military and naval expenditures of the Government from 1789 through the end of World War I.

13. To meet these accelerated demands, the armed forces had to call, in largest measure, upon private industry which, prior to December 7, 1941, was devoting only 25% of its total production to defense work, and of this amount, by far the largest proportion resulted from the use of existing idle capacity and the establishment of new facilities rather than from the conversion of existing facilities geared to civilian production. Little stoppage of civilian [fol. 103] production had occurred prior to December 1, 1941. If the imperative needs of the armament program were to be satisfied, wholesale conversion of existing production facilities to a war economy would have to occur. By the end of 1942, the proportion of manufacturing industry devoted to war production amounted to upwards of 45%, and presently this percentage is estimated at 60%. Some of this increase is, of course, attributable to the continued construction and use of new facilities, but the greater part of it has come from conversion of existing facilities since December 1941.

14. The armed forces were thus forced to grapple with major difficulties stemming from (a) the greatly increased demands for supplies of all types, (b) the accelerated pro-

gram requiring immediate production, and (c) the urgent and rapid conversion of the great mass of American industry to war work and the large-scale use of new facilities. Other acute problems were caused by (d) the demand for new products not previously manufactured, and by the constant modification of specifications to reflect improvements in design or changing needs, and (e) by the current uncertainty in the amounts of materiel to be procured, and the grave difficulties in the supply and cost of labor and materiel which were daily arising at that time:

(a) The greatly increased demand for supplies made the accurate forecasting of costs very difficult. Starting costs were bound to be higher than those incurred after mass production had begun; but the extent to which quantity production would bring a sharp drop in costs could not be estimated either by the Government or by contractors, and the latter were naturally very cautious in prophesying about their future costs. This was frequently true in the case of standard articles previously manufactured in small [fol. 104] quantities and was uniformly true in the case of new products.

(b) The urgent need for placing orders and starting production as soon as possible placed the importance of speed far above thorough analysis or careful negotiations. Time was of the essence, and the Government personnel entrusted with negotiation and procurement were, of necessity, too few and too overburdened to follow the normal procedures of careful procurement. There was simply no time to collate and check the cost information which in less abnormal times would be required; and, of course, such cost information pertinent to wartime production was frequently nowhere obtainable.

(c) The conversion of peacetime facilities to war work meant that cost data for the new production were unavailable, even for established plants. And in the hundreds of new plants producing war goods, only the roughest guess as to the costs of manufacturing which would be experienced during actual production could be made. Marginal producers, and those with no experience with the product or with the greatly increased quantities they would be called upon to produce, had to be used.

(d) War on the scale and under the conditions we are fighting calls for unceasing development, production, use,

and improvement of countless new supplies and weapons. The demands of amphibious warfare, for instance, led to the development of amphibian boats and cargo carriers. The mechanization of modern warfare forced the development and rapid production of such items as tanks and motorized gun carriers as well as of the weapons employed against them: anti-tank guns and grenades, armor-piercing ammunition, self-propelled mounts, and anti-aircraft guns. The spurt and rapid changes in aircraft development are [fol. 105] common knowledge, as is the growth of communication and detection devices. Changes in design and material also frequently resulted from shortages of previously used components. The use of steel had to be severely limited wherever a less critical material could be substituted. Motor vehicle cargo bodies, for example, were converted from steel to wood. Acute shortages of copper and brass led to other changes in accepted design. Great use was made of plastics in order to release critical metals. This activity can be partly epitomized in the summary statistic that during the fiscal year 1942 approximately 1,200 Army specifications were reviewed, and revised or approved, and about 425 specifications were completely cancelled.

(e) Material and labor shortages were acute in the spring of 1942. The consequence was that it was generally difficult, except within the widest limits, to establish accurate schedules for the production of supplies. The Army's requirements had to be drastically reduced, in the months from February to June 1942, because of these factors, and these changes and reductions were reflected in the War Department's procurement program. An equally important consequence was the difficulty of gauging both the costs and the time of performance because of the shortages and anticipated rise in the costs of labor and materials

15. All these factors made advance pricing a haphazard process in which the war procurement agencies could put little trust. The situation with which we were faced is well summarized in the following two statements (one by a Government agency and the other by a large war contractor) with which I am in full accord and which I believe to be an accurate description of the procurement situation as it existed after the coming of the war. The following is an excerpt from the Introduction to the Renegotiation Regula-

[fol. 106] tions issued by the War Contracts Price Adjustment Board:

> The war program creates problems of procurement and production unprecedented in scale and complexity. War materials of all kinds are required in enormous quantities with the greatest possible speed. The munitions program expanded with such rapidity that contracting officers were hard pressed to place contracts in time to meet the accelerated requirements. In order to avoid delay, they had to make contracts without adequate data. Obtaining the material was the first issue. Many contractors were asked to produce articles which had never been produced before and which were subject to frequent change. Others were asked to produce articles which were new to them. Still others, who had produced articles in small quantities, were asked to produce them in amounts far beyond their previous experience. Quantities needed, the rates of delivery and specifications had often to be revised in the light of experience and the demands of war. Shortages of material, priorities, and allocations increased the uncertainty of production.
>
> Besides these circumstances, contractors and contracting officers were frequently unable to make an accurate forecast of costs on which to base prices. During the period of transition, costs were certain to be high. New facilities had to be obtained, new personnel employed and trained to new methods and new sources of supply developed. How long this would take was itself uncertain. After the contractor got into production, greater efficiency, improved methods, and increased volume could be expected to reduce costs sharply.

The following are excerpts from a report by the General Motors Corporation, in September 1943, to the War Department Price Adjustment Board:

[fol. 107] With the advent of the war-production program, the automatic check on pricing policy which had been furnished by competition during peacetime could no longer be relied upon. The Corporation was obliged to undertake the manufacture of many products which were entirely foreign to its own past operations. In

many instances, these products had not been produced by any manufacturers in the volume contemplated by the war program. As a result, there was no ready-made yardstick against which the Corporation could measure proposed prices, and it became necessary to rely largely upon the judgment of the several general managers of the operating divisions and the Government contracting officers, as well as whatever limited experience might be available from other producers, as to the reasonableness of the cost estimates and prices submitted. In certain cases, the only practical solution of the pricing problem has been to insert clauses into contracts providing that prices would be reviewed as soon as representative cost experience had been obtained as a result of volume production.

Under these circumstances, it has been impossible to predict with any degree of certainty what the operating results of particular contracts might ultimately be. It therefore became imperative for the Corporation to establish as soon as possible a basic pricing policy which would take into account these unusual conditions and insure that proper and effective pricing control would be obtained. In establishing this policy, the primary considerations were twofold. First, it was recognized that in producing war material, the checks of normal competition had been removed, and that the peacetime conception of desirable profit margins, as previously described, had to be modified. Second, it was considered essential to maintain, as far as possible, the Corporation's normal method of doing business on a decentralized basis, with primary responsi-
[fol. 108] bility for contracting, pricing and production resting upon the divisional general managers, subject to the over-all general policies of the Corporation.

* * *

The policy of taking contracts on a fixed-price basis whenever practicable was adopted (despite the increased risk) because of the greater incentive to efficient operation afforded by this type of contract as compared with the cost-plus-fixed-fee type. However, it was recognized that the divisions were undertaking the production of war materials which were not only new to the Corporation, but had not been manufactured by anyone on a "mass-production" basis. There-

fore, there was always a possibility that initial cost estimates on certain contracts, even though they appeared reasonable to the divisional general managers and the Government contracting officers at the time the estimates were prepared, might turn out to be higher than actual costs of production as volume increased, when designs were changed, and as manufacturing experience was obtained. • • •

16. A graphic illustration of the way in which all the factors of uncertainty listed above combined to make the advance estimation of costs extremely difficult in 1941 and 1942 is furnished by the experience of the General Motors Corporation. That company is one of the largest peacetime manufacturers of automotive products, its accounting and auditing procedures are superior, and its ability to forecast the costs of manufacture of automotive products would far outrun that of most other producers. Nevertheless, as the company itself fully realized (see paragraph 15 above), even it was in no position to estimate its costs with any acceptable margin of accuracy. General Motors accepted contracts containing redetermination provisions, under which an original price based on the best available estimate of costs was established, with revisions made after [fol. 109] the costs of a preliminary run of 1,000 units and a test run of a further 1,000 units were available. The price for the remainder of the contract was determined on the basis of the test run. The results obtained under two of these contracts were as follows:

a. *Medium Tank* (per unit):

Original price (middle of 1941)	$67,401
	Estimated redetermined value
Preliminary run (March 1942-December 1942), 1,000 units (including preproduction expenses)	$50,947
Test run (December 1942-February 1943), 1,000 units	39,079
Remainder (February 1943-August 1943), 1,053 units	39,285

b. *Light Tank* (per unit):

Original price (set during 1941)	$45,000

	Estimated redetermined value
Preliminary run (April 1942-October 1942), 1,000 units	$34,625.99
Test run (October 1942-December 1942), 1,000 units	26,972.96
Remainder (December 1942-February 1943), 1,266 units	28,347.09
2nd Preliminary run (Feb. 1943-June 1943), 1000 units	24,658.65

c. The following table illustrates the sharp decrease in costs following a sharp rise in quantity of production, and the gaining of manufacturing experience. The figures represent revisions of General Motors Corporation's price for the *.50 cal. heavy barrel machine gun:*

	Units	Price
Original price (Aug. 1941-Dec. 1941)	1,308	$868.07
1st revision (Jan. 1942-Mar. 1942)	2,830	632.55
2nd revision (Apr. 1942-May 1942)	3,247	532.00
3rd revision (May 1942-Sept. 1942)	14,717	413.60
10th revision (June 1943-Aug. 1943)	3,500	300.59

17. Faced with these difficulties of estimating production costs and also with the pressing need for speed in procurement, the War Department naturally chose to emphasize, after December 7, 1941, the speedy placing of a mass of contracts. Pressure to obtain supplies was already great before the attack on Pearl Harbor, but thereafter it was [fol. 110] made even clearer to contracting officers that they were expected to place the increasing load of orders assigned to them with the least possible delay. The war would not rest to allow proper negotiation, and the War Department made it clear that the primary goal was speed in obtaining the necessary equipment and supplies. Illustrative is P. & C. General Directive No. 8,[1] issued January

[1] P. & C. General Directives were issued, under my direction, by the Purchases and Contracts Branch of the Office of the Under Secretary of War; this branch later became the Contract Division, and the directives were entitled CD General Directives; in March 1942, the unit became the Purchases Branch, Procurement and Distribution Division, Headquarters, Services of Supply, and the directives were entitled PB General Directives.

14, 1942 (attached hereto as Exhibit B), which stated that "price is a secondary consideration as compared with speed and efficient production," and "speed in placing orders now authorized is important, but speed of production as a whole during the next 18 months is of even greater importance. * * * War calls for the same boldness and imagination in procurement as it does in meeting combat conditions in the field." War Production Board Directive No. 2, March 3, 1942, placed "primary emphasis * * * upon securing delivery in the time required by the war program." P. B. General Directive No. 34, dated April 9, 1942, which coordinated War Department rules concerning purchases, reiterated the WPB standards and added that in giving effect to these policies "it is recognized that it may be necessary to purchase at other than the lowest price offered."

18. To implement this policy of speedy procurement, and at the same time to adjust, as best it could, to the conditions of wartime production, the War Department adopted [fol. 111] several procurement devices and policies.

a. Peacetime War Department procurement, with certain exceptions, was accomplished through advertising for bids. At the beginning of the general emergency it was foreseen that this method would prove impracticable for emergency procurement, and the Act of July 2, 1940 (Public No. 703, 76th Congress) authorized contracting without advertising for national-defense purposes. This authority was widely used for the purchase of such supplies as aircraft and tanks, but in many fields it was believed that the Government could still avail itself of the safeguards of letting contracts by advertising. After the declaration of war, however, it was seen that negotiation would have to supplant advertising almost entirely. The increased need for speed in procurement, the necessity of employing even high-cost producers, the unfamiliarity of most contractors with the products or the quantities they were called upon to manufacture, and all the uncertainties of the period described above, combined to render advertising unsuitable to wartime procurement. Accordingly, on December 16, 1941, the Secretary of War issued a directive broadly extending the authority to make procurements without advertising, and by directive of December 17, 1941 (P. & C. General Directive No. 81) I ordered "that the authority to place orders

without advertising be utilized in all cases where that method of procurement will expedite the accomplishment of the war effort." The First War Powers Act of 1941 (approved December 18, 1941), and Executive Order No. 9001, issued December 27, 1941, confirmed and extended the power to make contracts by negotiation, and thereafter the use of that method became dominant in Army procure-
[fol. 112] ment. On March 3, 1942, War Production Board Directive No. 2 required all of our war contracts to be negotiated (unless specific authority to advertise were granted), and on March 4, 1942, this rule was made effective in the War Department by CD General Directive No. 25.

b. Speed in procurement and the utilization of all available producing facilities required decentralization of procurement, increased subcontracting, and widespread distribution of war orders. (1) Prior to December, 1941, considerable decentralization had been effected; the limits of the dollar amounts of contracts which could be approved by echelons below the office of the Under Secretary of War had gradually been raised to $500,000. On December 16, 1941, the Secretary of War directed a sweeping decentralization of procurement, and on the next day I issued P. & C. General Directive No. 81, empowering the chiefs of the supply arms and services to approve contracts up to $5,000,000, and authorizing them to decentralize still further. This directive stated that "In order to enable orders to be placed in the quickest possible time, it is desired that chiefs of supply arms and services decentralize to their field agencies the actual work of procurement and the placing of awards and contracts to the greatest extent compatible with efficiency and proper safeguarding of the public interest." (2) Subcontracting had also been fostered from the beginning of the emergency, since it was foreseen that full defense production could not otherwise be achieved. With the outbreak of the war, P. & C. General Directive No. 8, dated January 14, 1942 (Subject: "Selection of Contractors for war production"), strongly emphasized this need and required procurement officials to insist upon subcontracting: "The heavy procurement program and need for speed in production make vital the best utilization of
[fol. 113] every facility." (3) For the same reasons, the policy of the widespread distribution of defense orders was adopted. This policy was partially crystallized in War Pro-

duction Board Directive No. 2, March 3, 1942, which stated "that contracts shall be placed so as to conserve, for the more difficult war-production problems, the facilities of concerns best able, by reason of engineering, managerial, and physical resources, to handle them. Accordingly, contracts for standard or other items which involve relatively simple production problems shall be placed with concerns, normally the smaller ones, which are less able to handle the more difficult war-production problems."

c. Letters of Intent were used early in the emergency to expedite production. Through use of this form of contract, the contractor could begin manufacturing the needed supplies before agreement had been reached on a definite price, or the full extent of the procurement determined. The slightly different letter contract form was authorized in May and June 1941, for the same purpose. On December 17, 1941, there was issued at my direction, P. & C. General Directive No. 88, which ordered the more extensive use of letter contracts "in the interest of expediting procurement." On January 16, 1942, revised letter contract forms were issued, and on January 13, 1942, a letter purchase order (to replace the letter of intent) was issued and its use directed by contracting officers "where the necessity for the supplies is so urgent as to render prior negotiations in respect to price, schedule of deliveries, or other terms impracticable, or where negotiations in respect thereto have failed to result in an agreement" (P. & C. General Directive No. 5). These policies were emphasized to the contracting personnel by the various supply arms and services. For [fol. 114] instance, the Signal Corps directed (April 20, 1942) that in no case in which time was of the essence should the selection of a satisfactory contractor be delayed to await agreement on the price; "if immediate agreement cannot be reached on the price, a letter purchase order or a letter of intent should be issued to the contractor selected, so that production can be initiated pending the negotiation of price." Pursuant to these directions, these contract forms were used in great number throughout the War Department.

19. Contractual devices were also adopted in an attempt to overcome the insistence of contractors on covering all the contingencies of wartime production into their prices.

a. One means, of course, of eliminating the probability of excessive profits and of tying the contract price to actual costs is the cost-plus-fixed-fee form of contract. The Act of July 2, 1940, authorized the use of this form, and War Department directives of the same day permitted its use when "deemed necessary in the interest of the United States in order to accomplish or expedite the national defense program." But this form of contract has never been favored by the War Department, for the reasons that it offers no financial incentive to control or reduce costs and that it requires an inordinate amount of auditing and paper work. However, its use was found necessary in some cases. P. & C. General Directive No. 81, dated December 17, 1941, provided that "contracts will be negotiated on a cost-plus-a-fixed-fee basis only when the use of that form of contract is essential." Later directives have continued and strengthened that policy and have consistently urged the conversion of cost-plus-fixed-fee contracts to the fixed-price basis.

[fol. 115] b. Another attempt to meet the objections of suppliers who felt that they could not quote firm prices because of anticipated rises in material and labor costs, were escalator—price adjustment clauses. On September 17, 1941, the War Department approved a price adjustment (escalator) article to be used "only in exceptional cases where the facts justify their use." (P. & C. General Directive No. 48). It was expressly required that all contracts containing the escalator clause also include an article providing for termination of the contract for the convenience of the Government. On December 17, 1941, P. & C. General Directive No. 86 issued certain amendments, mainly concerning indirect labor and material costs, to the approved clauses. Copies of these two directives (including the escalator clauses) are attached hereto as Exhibits C and D. Escalator clauses present some of the undesirable features of cost-plus contracts. Their administration is complex, and they require extensive accounting and auditing.

These devices were not favored by the War Department, for the reasons I have stated. By themselves, they were not satisfactory or effective methods for confining profits to reasonable levels or for decreasing production costs. Other means of attaining these ends had to be developed.

Need for Renegotiation and Profit Limitation and Measures to That End

20. At the beginning of the limited emergency in 1939, the only applicable statutory limits on profits from the sale of military or naval supplies were contained in the Vinson-Trammel Act of March 27, 1934, as amended (relating to naval vessels) and the Merchant Marine Act of 1936, as [fol. 116] amended (relating to construction of merchant ships). The Act of April 3, 1939, extended percentage profit limitation to cover Army aircraft contracts. The percentage of profit allowed to contractors was lowered to approximately 8% by the Act of June 28, 1940, but the Second Supplemental National Defense Appropriation Act, 1941, enacted September 9, 1940, provided that as to aircraft the old limitation of 12% was to prevail.

21. Manufacturers of war products, particularly aircraft manufacturers, asserted that they could not take Government contracts in the face of these profit limitations. Many subcontractors were reluctant to work for them under Government prime contracts at 8% or 12% when they could make 15% or 20% working for civilian manufacturers. Moreover, many subcontractors were unwilling to take contracts which involved the necessity of keeping elaborate cost records subject to Government audit. It was therefore decided that the Vinson Act would have to be suspended, and that an excess profits tax should be levied. Accordingly, the Second Revenue Act of 1940, containing the excess profits tax, suspended the profit limitation statutes applicable to Army and Navy contracts entered into after December 31, 1939, or uncompleted on that date by contractors and subcontractors subject to the new excess profits tax. Thereafter, until the passage of the Sixth Supplemental National Defense Appropriation Act of 1942, the only statutory provisions concerning war or defense contracts were those of the excess profits tax.

22. From the beginning of 1942, officials of the War Department were aware that a necessary result of the unstable purchasing conditions of war procurement would be the accumulation by many contractors and subcontractors of [fol. 117] excessive profits which would not be siphoned off by the existing tax legislation. Publication of financial reports of war contractors for 1941 indicated the tremen-

dously increased profits derived from the more limited defense program. The decision of the Supreme Court in *United States* v. *Bethlehem Steel Corporation,* 315 U. S. 289, decided in February 1942, reemphasized the extent of the profits which had been made in World War I. On March 23, 1942, the Naval Affairs Committee of the House of Representatives conducted a hearing on the defense profits of Jack & Heintz, Inc. (Hearings before the Committee on Naval Affairs, House of Representatives, 77th Cong., 2d Session, pursuant to H. Res. 162, Vol. 1), and the information divulged at that hearing on the exorbitant profits made by that concern received wide publicity. Other information of the same character was developed by the Naval Affairs and other Congressional Committees and was made available to the War Department. The War Department and at least one of the supply services (the Signal Corps) established rudimentary cost analysis units to study the manufacturing cost, of Army suppliers, and preparations were made to review and check contract prices.

23. The need for eliminating excessive profits obtained from war production is as paramount as it is obvious. Excessive profits mean increased tax and war loan burdens on the public and increased pressure toward inflation. Undue profit margins are also a cushion for wasteful and costly manufacture. Perhaps most important is the destructive effect of excessive war profits upon the morale of men in the armed services and of civilian workers. The sharp reaction to war profits which occurred after World War I is eloquent testimony of the significance of this factor.

[fol. 148] Voluntary Renegotiation

24. During the defense period, prior to December 7, 1941, there had been a certain number of voluntary refunds and price reductions by defense contractors. In June and July, 1941, War Supplies, Ltd., the Canadian Government corporation through which the United States purchases in Canada, agreed to refund to the War Department all profits over 10% of cost. In October 1941, it was found advisable to issue a directive on the taxable character of sums received by contractors but voluntarily refunded to the United States. P. & C. General Directive No. 54, October 7, 1941, stated that: "From time to time a contractor with

the Government discovers that his profits are larger than he had at first estimated, and desires to refund the excess to the United States. Under these circumstances, certain contractors have hesitated lest in making the refund they subject themselves to a tax penalty, either through paying or having paid income taxes on the profits received or through being forced to pay a gift tax on any refund." But voluntary renegotiation took on much greater scope in early 1942.

25. On the same day that they appeared before the Naval Affairs Committee (March 23, 1942), officials of Jack & Heintz, Inc. met with procurement officials of the War Department for the purpose of reviewing the Company's Army contracts. It was agreed that the contractor would reduce its prices on its various contracts, totaling somewhat over $50,000,000, by an over-all amount slightly in excess of $10,000,000. On March 28, 1942, our procurement officials met with officials of Continental Motors Corporation to review that company's aircraft contracts. After negotiations, the company voluntarily agreed to reduce its prices on existing contracts by a total of $40,000,000. A third such meeting, on April 6th, with the Sperry Corporation resulted [fol. 119] in a voluntary reduction of about $100,000,000.

26. Other voluntary renegotiations were effected in the first quarter of 1942. A number of contractors expressed their willingness to adjust their prices to reflect actual costs, as they developed, and to restrict their profits to proper wartime levels.

a. Prior to May, 1942, General Motors Corporation had made voluntary price reductions running into more than $200,000,000, according to its own figures. One example follows: In a contract made in August 1941 for 8,000 aircraft engines, the Allison Division of General Motors included contingency reserves in the unit prices but stated that if excessive profits developed during the course of performance it would be willing to grant reductions on undelivered engines. In December 1941 and January 1942, the War Department received information that costs were lower than anticipated. Renegotiation discussions were begun with the contractor, and on March 30, 1942, it offered to refund approximately $20,000,000 to the Government.

b. In June 1941, Republic Aviation Corporation undertook to manufacture 125 P-43A airplanes, over a period of some ten months, at a stated unit price. The Government's negotiators believed that the agreed price might lead to excessive profits. The contractor's representatives, though believing that the price was not too high, orally agreed that if profits in excess of 10 or 11 percent were made, the company would either voluntarily reduce its contract price or would construct an experimental plane for the Government without cost. On December 10, 1941 the contractor informed the Government that its profit on the contract would probably exceed the stipulated amount and suggested that it [fol. 120] furnish the experimental airplane. The War Department was not interested in the experimental airplane, and after further cost figures indicating excessive profits became available, the contractor offered an acceptable voluntary price reduction of $1,445,370.00.

c. In April 1942, information became available that Beech Aircraft Corporation was making a profit of approximately 33% on its airplane contracts. On April 16th and 17th the Company agreed to review the contract prices, and shortly thereafter price reduction agreements were consummated.

d. Similarly, in April 1942 discussions were begun with Cessna Aircraft Corporation, Bendix Aviation Corporation, and some other contractors, which resulted in price reductions.

27. In March 1942, the War Department determined to establish formal price renegotiation machinery, and plans were drawn for a Price Adjustment Board to negotiate with contractors for reduced prices where excessive profits had been or were likely to be secured. On March 27, 1942 there was prepared in the War Department a tentative memorandum outlining the policy and procedure of the putative War Department Price Adjustment Board. The purpose of the Board, its operating policies, and method of operations were set forth, as well as a list of factors to be considered in determining the reasonableness of profits. A copy of this memorandum is attached as Exhibit E. To be noted is the similarity between the factors listed as governing profit reasonableness in this memorandum, in the Joint Statement by the War, Navy, and Treasury Departments and the Maritime Commission, dated March 1943, and in the Renego-

tiation Act, as amended and reenacted in the Revenue Act of 1943. This memorandum of March 27th was not published nor was it issued officially, but use was made of it in voluntary renegotiations conducted by the War Department. At the meeting of March 28th with Continental Motors Corporation (see paragraph 25 above) this memorandum was read to the contractor's representatives as a preliminary and tentative statement of War Department policy on excessive profits.

[fol. 121]

28. Title XIII of the Second War Powers Act, enacted March 27, 1942, conferred upon the Government authority to inspect the plants, books, and records of war contractors. On April 10th, the President issued Executive Order 9127 ("Designating the Departments and Agencies to Inspect the Plants and Audit the Books and Records of Defense Contractors under Title XIII of the Second War Powers Act, 1942") in order "to prevent the accumulation of unreasonable profits, to avoid waste of Government funds, and to implement other measures which have been undertaken to forestall price rises and inflation." Under this order, the cost analysis units in the War Department were expanded and strengthened, and a new basis was laid for price adjustment boards.

29. The Under Secretary of War, the Under Secretary of the Navy and the Chairman of the Maritime Commission (with the approval of the Chairman of the War Production Board) agreed to establish price adjustment boards within the three agencies in order to advise and assist procurement officials "in securing adjustments or refunds in instances where it is determined that costs or profits of contractors are, or may be, excessive for any reason." A copy of this memorandum is attached as Exhibit F. Plans for such a board in the War Department had been proceeding meanwhile and on April 25th, Lieutenant General Brehon Somervell, Commanding General of the Services of Supply, formally established such a price adjustment board, with my [fol. 122] approval. A copy of his memorandum is attached as Exhibit G.

30. A corollary to the establishment of these procedures for voluntary renegotiation, without specific contractual or statutory basis, was the development of contract clauses looking toward the renegotiation or redetermination of

prices after partial or complete performance. The problem was submitted to a committee of representatives of the War Production Board, the War Department and the Navy Department and resulted in the preparation of two contract clauses. One, known as the "redetermination clause," was designed to permit automatic adjustment downward in price on the basis of actual cost experience during a "test run" early in the performance of the contract. The other contract provision, originally known as the "renegotiation clause," was designed to permit adjustment of the price either upward or downward in the light of actual cost experience after part performance, as soon as reasonably reliable cost estimates were feasible. These articles were promulgated for use in War Department contracts by P. R. General Directive No. 31, dated March 13, 1942, a copy of which is attached as Exhibit H. One of the purposes of the new clauses can be gained from the opening statement of the directive that "It is essential to eliminate all delays in the production of items immediately required which result from the time required for the negotiation of fixed price contracts."

Statutory Proposals

31. The Congress was, of course, also concerned with the probability that excessive profits would be made by many war contractors, despite the excess profits tax. The disclo- [fol. 123] sures at committee hearings and the profit information available was thought to require legislative action. In March 1942, a bill was introduced to establish a rigid profit limitation of 6% on war contracts. On behalf of the War Department, I opposed this proposal before the Committee on Naval Affairs of the House of Representatives (March 19, 1942), and Mr. Donald Nelson opposed it on behalf of the War Production Board (March 24, 1942). (Hearings before the Committee on Naval Affairs, House of Representatives, 77th Cong., 2nd Session, on H. R. 6790, pp. 2473-2475, 2577-2578.) Mr. Nelson and I pointed out that the bill, if enacted, was likely to interfere with war production, especially by delaying the conversion of small business to war work and also by forcing the increased use of the cumbersome and wasteful cost-plus-a-fixed-fee contract. We also pointed out that a fair percentage of profit was not solely a function of the cost of performance but depended upon such factors as turn-over, volume of busi-

ness, amount of invested capital, financial structure, time of performance, and contribution to increased efficiency. Depending upon these factors, and particularly upon dollar volume of business, a 6% profit might be far too large or far too small. Attention was also called to the impossibility, under the flat percentage system, of allowing the recoupment of losses. At the same time, I stressed to the Committee that the War Department recognized its "plain duty to take every practicable step to prevent contractors from obtaining excessive and unconscionable profits," and I described the cost analysis and price adjustment projects which were then being formulated (see pars. 27-29 above), and the price redetermination and revision clauses which [fol. 124] had been authorized (see par. 30 above). This profit limitation bill, to which I expressed the War Department's opposition, was not acted upon by the House of Representatives.

32. On March 28, 1942, Congressman Case offered on the floor of the House of Representatives two profit-limitation amendments to the Sixth Supplemental National Defense Appropriation Bill. His first proposal was that no final payment on a war contract be made by the Government "until the contractor shall have filed with the procuring agency a certificate of costs and an agreement for renegotiation and reimbursement satisfactory to the Secretary of War or the Secretary of the Navy, as the case may be." This amendment was subject to a point of order, and Congressman Case then offered a substitute amendment providing that final payment was not to be made "to any contractor who fails to file with the procuring agency a certificate of cost and an agreement for renegotiation of contract and reimbursement of profits in excess of 6 per cent." This amendment was adopted by the House of Representatives without debate. Mr. Case has stated that his proposals were modeled, in part, upon the renegotiation clauses developed by the procurement agencies (see par. 30 above). See Hearings before the Subcommittee of the Committee on Appropriations, U. S. Senate, 77th Cong., 2nd Sess. on H. R. 6868, pp. 89-92, 211-2.

33. At a hearing held on March 31 and April 1, 1942, by a subcommittee of the Senate Committee on Appropriations, on the Sixth Supplemental National Defense Appro-

priations Bill for 1942, representatives of the Government stated the objections to the Case amendment, as it then stood. General Somervell reviewed the factors making adequate pricing impossible in many cases and described [fol. 125] the price adjustment procedures which had already been established in the War Department. The committee was informed that a Cost Analysis Section and a Price Adjustment Board had been set up and were at work and tentative policies and procedures had been laid down (Hearings pp. 24-25). The approved "redetermination" and "renegotiation" contract articles were also described to this subcommittee and their use explained. General Somervell, Mr. Donald Nelson of the War Production Board, and other representatives of the procurement agencies again stated the objections to an inelastic profit-limitation provision of the type of the Case amendment. It was pointed out that the amount and rate of profit should depend—out of fairness to contractors and to furnish the proper incentive to reduce costs—on a number of factors, such as rapidity of turn-over, development costs, production time, money invested in the business, risks incurred, efficiency of production; a flat percentage limitation lumping all contractors together would not only be unfair to many and too generous to others but is subject to the very defects which have placed the cost-plus contract in disfavor; moreover, the statutory percentage of profit which is intended to be a maximum tends to become a minimum and contractors believe that they are entitled to receive that rate of profit.

34. The Senate Subcommittee requested the procurement agencies to supply a substitute for the Case amendment. On April 2, 1942, General Somervell submitted a proposal on behalf of the War and Navy Departments and the War Production Board. A copy of this substitute proposal is attached as Exhibit I. The suggestion was based on the theory that if every contract price could be re-[fol. 126] examined by the parties in the light of actual experience under the contract, it should be possible to eliminate the bulk of excessive profits. Section 403, as finally enacted, differs in many respects from our proposal, but it retains the central principle that a fixed percentage limitation on profits should not be established.

35. The War Department has consistently opposed the substitution of a 100% excess profits tax in place of the renegotiation statute, for the same reasons for which we disapproved a flat percentage limitation on profits from war contracts. Our views are stated at length in the report of the Hearings before a Subcommittee of the Senate Committee on Finance on Section 403 of Public Law No. 528, September 29-30, 1942, 77th Congress, 2d Session, and the Hearings before the Committee on Naval Affairs, House of Representatives, pursuant to H. Res. 30, June 1943, 78th Cong., 1st Sess. pp. 997-1000. The Introductions to the Renegotiation Regulations of the War Contracts Price Adjustment Board and to the Joint Renegotiation Manual approved by the Joint Price Adjustment Board also contain statements on this point with which the War Department is in accord. In brief, the major objection to a 100% excess profits tax is that it would remove all incentive to reduce costs or promote efficiency, and in this respect would tend to increase the cost of war procurement through the waste of manpower and resources so as to counterbalance any gain in tax collections.

36. The War Department has found that the Renegotiation Act is the most satisfactory and effective method of eliminating excess profits on war contracts. The Department has vigorously opposed the repeal of the statute.

[fol. 127] Contracts on Which Final Payment Had Not Been Made on April 28, 1942

37. At the end of April 1942, the following amounts were obligated for contracts, but unexpended, by the Navy Department and the three major procurement services of the War Department:

Army Air Forces contracts, over	$16,700,000,000
Ordnance Department contracts, over	10,000,000,000
Engineers contracts, over	4,000,000,000
Navy contracts, over	18,000,000,000
Total, over	48,700,000,000

These figures concern only the agencies listed; they do not include subcontracts; nor do they include sums actually paid prior to April 28, 1942, on contracts on which final

payment was not made until after that date. The figures do, however, include sums owing on some contracts exempt from renegotiation under the statute, but such sums are relatively small.

38. On the whole, it is certain that, on April 28, 1942, there were outstanding uncompleted war contracts in a total figure considerably in excess of 50 billion dollars which would have been exempt from renegotiation if the statute had not been made applicable to contracts existing on April 28th but with respect to which final payment had not been made by that date.

39. It is impossible to give more than the most general data concerning the life of the uncompleted contracts in existence on April 28, 1942. The average time required for the construction of the major types of projects (cantonments, airfields, ordnance plants) being constructed under the supervision of the Corps of Engineers in April 1942 was from 7 to 18 months. A substantial proportion of the Ordnance contracts placed during the first four months of 1942 extended for over six months; some of these contracts [fol. 128] contemplated production extending over a period as long as two years. The Navy Department estimates that at least one-third of its funds which were obligated but unexpended on April 30, 1942, represented contracts requiring 12 months or longer for performance.

Excessive Profits Eliminated by Renegotiation

40. As of September 19, 1944, 34,966 contractors had been assigned for renegotiation with respect to fiscal years ending during the calendar year 1942. As of the same date, 35,200 contractors had been assigned for such renegotiation with respect to fiscal years ending during the calendar year 1943. Of the cases assigned with respect to fiscal years ending in the calendar year 1942, relatively few remain uncompleted; and the renegotiation agencies are well along toward completion of the cases assigned with respect to fiscal years ending in the calendar year 1943.

41. As of September 22, 1944, in 7,949 cases excessive profits had been determined by agreement between the contractor and the Government, and at that date in 207 cases excessive profits had been determined by unilateral action by the Government without the agreement of the contractor.

Thus, 97.5% of the cases in which excessive profits had been determined involved bilateral agreements in which the contractor joined. These figures do not include the cases, of which there are a large number, in which no excessive profits were found or in which the renegotiation proceedings were cancelled as the result of information indicating no excessive profits. It should be noted, too, that the number of contractors affected by the bilateral agreements exceeds the number of 7,949, since many of these agreements affect groups of parent and subsidiary corporations.

[fol. 129] 42. It is impossible at the present time to give complete figures as to the dollar volume of the sales covered by the cases in which excessive profits have been determined. As of September 16, 1944, in the 7,733 cases concluded by bilateral agreement or unilateral determination (excluding Army construction contracts), the aggregate renegotiable sales of the contractors affected (prior to adjustment for excessive profits eliminated) were $30,975,405,000. Excessive profits eliminated in these cases amounted to $3,586,652,000. In addition, approximately $57,000,000 in excessive profits had been recovered from construction contractors assigned to the Chief of Engineers for renegotiation. These figures do not take account of reductions in Federal taxes occasioned by the elimination of excessive profits through renegotiation.

43. The figures in the preceding paragraph do not include excessive profits eliminated (a) by refunds made to contracting officers prior to and unrelated to statutory renegotiation, (b) by reduced prices with respect to future performance or deliveries under existing contracts, or (c) by reduced prices under new contracts. No statistical data are available as to the amounts of excessive profits so eliminated or prevented, but they have been substantial, and run into many hundred millions of dollars.

44. The data contained in paragraphs 40 to 43 cover renegotiations carried on by all agencies and not merely those in which the War Department is interested.

Renegotiation Procedure

45. From the very beginning of statutory renegotiation by the War Department, the attempt has always been made to secure the full cooperation of the contractor in the proc-

ess of renegotiation. It has been the uniform practice to [fol. 130] explain the purposes, policies, and methods of renegotiation to contractors and to elicit their participation both in the furnishing of information and in the drawing up of an agreement as to excessive profits. Although Title XIII of the Second War Powers Act, 1942, grants the Government certain powers to secure the pertinent records and data, on which renegotiation must be based, from recalcitrant contractors, we have always sought to obtain this information voluntarily, and without unduly hampering the contractor's activities. Similarly, although the statute empowers the renegotiation agencies to determine excessive profits unilaterally, it has always been our policy to renegotiate, in the literal sense, and to seek a bilateral agreement with the contractor, whenever possible.

46. In most cases, renegotiation in the War Department (for fiscal years ended on or prior to June 30, 1943) was conducted initially by Price Adjustment Sections of the Technical Services (e. g., Ordnance Department, Signal Corps, Chemical Warfare Service) and the Army Air Forces. If the initial renegotiation proceedings did not result in an agreement with the contractor, or if a bilateral agreement was proposed in cases where the contractor's gross sales were more than $10,000,000, the case was always referred to the War Department Price Adjustment Board. I am advised that the Board, in every case in which a contractor requested a meeting with representatives of that Board, accorded the contractor that opportunity. Until April 12, 1945, if an agreement could not be reached between the representatives of the Board and the contractor, the case was then referred, together with a full report, to me as Under Secretary of War. It was my practice to refer such case, for initial review, to one of my principal assistants, not otherwise connected with renegotiation. This assistant invariably allowed the contractor, upon the latter's request, to meet with him before he made any recommenda- [fol. 131] tion to me; and in this meeting the contractor could present any pertinent material not previously furnished and discuss the matter from the contractor's point of view. I personally made the final determination that excessive profits had been made in every case in which a unilateral determination was signed by me. The last hearing conducted by an assistant of mine under this procedure

was held on April 12, 1945. On April 11, 1945, I delegated to the Chairman of the War Department Price Adjustment Board the power to make unilateral determinations under the Renegotiation Act. I am informed that, pursuant to that delegation, the War Department Price Adjustment Board has established a Determination Committee consisting of the six War Department members of the Board. That Committee, as I am informed, has granted and will grant contractors an opportunity for a meeting with two members of the Committee, appointed by the Chairman for that purpose, before a final determination is made in any case where the Committee disapproves the determination recommended by the representatives of the Board who met with the contractor initially. In sum, opportunity is always afforded the contractor for discussions with representatives of the renegotiating agency and the presentation of pertinent data and argument. No unilateral determination has ever been made without the contractor's having been offered the opportunity, at some stage and in substantially all cases at several stages in the renegotiation process, to present his views and discuss the matter.

Robert P. Patterson (s)

Sworn to and subscribed before me this 11th day of June, 1945.

Anna C. Lanigan (s), Notary Public, D. C. (Seal)

My Commission Expires June 15, 1946.

[fol. 132] EXHIBIT A

W. P. B. Record of Monthly Awards of Prime War Supply Contracts

Date	Number of contracts				
	Total	Aircraft	Ships	Ordnance	All other
1941					
July	1,124	40	40	202	842
Aug.	1,352	62	77	264	949
Sept.	1,476	78	68	223	1,107
Oct.	1,824	97	49	305	1,373
Nov.	1,566	94	67	321	1,084
Dec.	1,885	116	63	384	1,322
1942					
Jan.	3,612	132	156	836	2,488
Feb.	3,656	136	165	710	2,645
Mar.	4,188	162	161	765	3,100
Apr.	4,866	187	197	795	3,687
May	3,597	114	126	459	2,898
June	3,657	143	171	439	2,904
	Value (millions of dollars)				
1941					
July	1,057	92	129	551	285
Aug.	1,842	688	237	636	281
Sept.	1,335	386	159	436	353
Oct.	2,404	1,264	107	569	464
Nov.	1,506	261	288	461	495
Dec.	3,131	985	406	1,150	589
1942					
Jan.	9,456	2,435	2,092	4,015	914
Feb.	7,301	3,628	893	1,891	889
Mar.	5,343	1,440	728	1,842	1,333
Apr.	5,715	1,234	1,014	1,808	1,659
May	4,843	1,337	759	1,530	1,216
June	5,299	937	1,249	1,709	1,404

[fol. 133] EXHIBIT B

War Department, Office of the Under Secretary
Washington, D. C.

January 14, 1942.

PC-E-400.13 (Procurement). P. & C. General Directive No. 8. Memorandum for: The Chief of the Air Corps. The Chief, Chemical Warfare Service. The Chief of Coast Artillery. The Chief of Engineers. The Chief, National Guard Bureau. The Chief of Ordnance. The Quartermaster General. The Chief Signal Officer. The Surgeon General.

Subject: Selection of contractors for war production.

1. The heavy procurement program and need for speed in production make vital the best utilization of every facil-

ity. As a limited number of facilities are able to undertake precision work, care must be exercised in allocating only such work to them, each plant to undertake the highest caliber of work its equipment can produce.

2. In awarding prime contracts, great weight must be placed upon the contractor's agreement to subcontract a high percentage whereyer this is feasible. Unless secondary facilities are thus put to work on the simpler components, difficulty will later be encountered in placing prime contracts calling for precision work. The best results will be obtained by insisting upon such subcontracting at the time of the award of the prime contract as efforts to have prime [fol. 134] contractors subcontract simpler components at a later date may be only partially successful after work has been started.

3. In many cases requirement of subcontracting will add to the total cost. Price is a secondary consideration as compared with speed and efficient production. Reasonable increase in price which will speed the program through subcontracting is justified. Because of the increase in price, subcontracting should be taken into account in making the award and should be provided for in the prime contract, where possible, rather than to assume that it can be arranged after the award has been made.

4. Speed in placing orders now authorized is important, but speed of production as a whole during the next 18 months is of even greater importance. Accordingly, under our present decentfalized procurement policy the chiefs of the supply arms and services and their district procurement offices must exercise their best judgment in the matters mentioned in paragraphs 1, 2 and 3 above. War calls for the same boldness and imagination in procurement as it does in meeting combat conditions in the field.

By direction of the Under Secretary of War:

(S) John W. N. Schulz, Brigadier General, U. S. Army, Director of Purchases and Contracts.

[fol. 135] EXHIBIT C

War Department, Office of the Under Secretary
Washington, D. C.

September 17, 1941.

PC-L 162 (Escalator Clause). P. & C. General Directive No. 48. Memorandum for The Chief of the Air Corps. The Chief, Chemical Warfare Service. The Chief of Coast Artillery. The Chief of Engineers. The Chief, National Guard Bureau. The Chief of Ordnance. The Quartermaster General. The Chief Signal Officer. The Surgeon General.

Subject: Price Adjustment Clause.

1. Price Adjustment articles (escalator clauses) will be included in supply contracts only in exceptional cases where the facts justify their use. In determining the justification for the inclusion of such a clause, the following factors, among others, should be given consideration:

a. The inclusion of an escalator clause should result in a lower contract price than if such a clause were not included. Before consenting to the inclusion of an escalator clause in a contract, the contracting officer should satisfy himself that the contractor has not included in the contract price any amount to cover probable increased direct labor or direct materials costs.

b. The time required for the performance of the contract should be such as to make it impossible to [fol. 136] forecast with reasonable accuracy the extent of changes in the direct labor or direct materials cost under the contract. Ordinarily the time of performance should not be less than six (6) months.

c. The contract should be of sufficient amount to warrant the administrative expenses which would be incurred in administering the escalator clause. As a general rule, contracts for less than $100,000 would not warrant such expenditure.

2. Attached hereto are copies of the Price Adjustment article (escalator clause) as approved by the Under Secretary of War on September 13, 1941, for use in supply con-

tracts hereafter entered into where it has been determined that an escalator clause should be included. Any deviations from this form will be made only after approval in each case by the Under Secretary of War. Requests for such approval will be accompanied by a detailed statement of the facts and reasons justifying such deviation.

3. All contracts containing this escalator clause will also contain an article providing for termination of the contract for the convenience of the Government.

4. It is desired that the foregoing instructions be communicated promptly to all contracting agencies in your branch.

By direction of the Under Secretary of War:
(S) John W. N. Schulz, Brigadier General, U. S. Army, Director of Purchases and Contracts.

Incls:
eys. Price Adjustment Clause.

[fol. 137] Form of Escalator Clause Approved by the Under Secretary of War, September 13, 1941

Article ..... Price Adjustments.

The total contract price stated in Article ..... is subject to adjustment for increases or decreases in direct labor and direct material costs in accordance with the following method:

(a) Labor.

(1) Upon the basis of labor costs prevailing in ...., 194.... (hereinafter called the base month) the direct labor cost is estimated to be $..... Direct labor, as used herein, refers only to the labor of employees of the Contractor performed directly on, and properly chargeable to, the supplies manufactured hereunder, excluding, but without limitation, all executive, managerial, supervisory, technical, professional, office, clerical and sales employees, but including working foremen, gangbosses and strawbosses. The Contractor represents that the above estimated cost is based upon a schedule, approved by the Contracting Officer, of the kinds or classes of jobs or occupations to be charged as direct labor under this contract, and that the estimate includes only such jobs or

occupations. In computing the actual direct labor cost for the purposes of paragraph (a) (2) and (a) (3) hereof, the cost of kinds or classes of jobs or occupations not listed in this schedule, a copy of which is attached hereto, shall not be included.

(2) After deliveries under this contract have been completed, the estimated direct labor cost set forth above shall be apportioned into direct labor cost quotas for the consecutive three-month periods (hereinafter called "quota periods") beginning on the first day of ....., 194...,[1] [fol. 138] and on the first day of each third month thereafter. This apportionment shall be made by dividing the actual direct labor cost properly charged to this contract during each quota period by the total actual direct labor cost under the contract, and by multiplying the percentage thus obtained for each quota period by the total estimated direct labor cost. The result shall be the direct labor cost quota for that period.

(3) Upon the basis of the average hourly earnings in the durable goods manufacturing industries compiled by the United States Department of Labor, Bureau of Labor Statistics, the Government will determine the average hourly earning for each quota period by adding the average hourly earnings for each month of such quota period and dividing their sum by three, and calculations will be made of the percentage of change of such average hourly earnings for each quota period in comparison with the average hourly earnings for the base month. The labor cost quota for each quota period will then be multiplied by the percentage of change for such quota period, and the result will be applied as an increase or decrease in the contract price; *Provided*, That the total of such increases in the contract price shall not exceed the amount by which the total actual direct labor cost exceeds the total estimated direct labor cost, and that the total of such decreases in the contract price shall not exceed the amount by which the total actual direct labor cost is less than the total estimated direct labor cost.

(b) Materials.

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[1] The month during which the contract is executed or performance is commenced, whichever is earlier.

[fol. 139] (1) Upon the basis of materials costs prevailing in the base month, the cost of direct materials which the Contractor will purchase for the performance of this contract, excluding materials to be used which the Contractor has on hand or for which firm price commitments have been obtained by him (hereinafter call "direct materials to be purchased hereunder"), is estimated to be $..... (hereinafter called "estimated adjustable materials cost"). Direct materials as used herein refers only to those materials which go into and become a component part of the Contractor's finished product and which, under the cost accounting system regularly employed in the Contractor's plant, are accounted for by direct charges to the particular contract. The Contractor represents that the above estimate is based upon a schedule, approved by the Contracting Officer, of the kinds and classes of "direct materials to be purchased hereunder." In computing the actual cost of "direct materials to be purchased hereunder" for the purposes of paragraphs (b) (2) and (b) (3) hereof, the cost of kinds or classes of materials not listed in this schedule, a copy of which is attached hereto, shall not be included.

(2) After deliveries under this contract have been completed, the "estimated adjustable materials cost" shall be apportioned into materials cost quotas for the quota periods as defined in paragraph (a) (2) above. This apportionment shall be made by dividing the total actual cost of "direct materials to be purchased hereunder" into the portion of such cost properly charged to the contract during each quota period, and by multiplying the percentage thus obtained for each quota period, by the total "estimated adjustable materials cost." The result shall be the materials cost quota for that period. Direct materials shall be charged [fol. 140] to the contract for the quota period during which the price therefor is determined as between the Contractor and the materials supplier; *Provided*, That where commitments are obtained by the Contractor for future deliveries at a firm price in excess of the market price prevailing at the time such commitments were obtained, such materials shall be charged to the contract for the quota period during which delivery is to be received by the Contractor; *And, Provided further*, That with respect to materials which are not identifiable with the purchase commitments under which they are acquired, determinations as to (1) whether the

materials employed in the performance of this contract were on hand at the time the contract was executed, and (2) the quota period to which the materials are to be charged and the amount of such charge shall, with the approval of the Contracting Officer, be made on the basis of the accounting system regularly employed in the Contractor's plant.

(3) The Government will average for each quota period the index numbers of wholesale prices for .....[2] compiled by the United States Department of Labor, Bureau of Labor Statistics for the three months included within such quota period, and calculations will be made of the percentage of change of such average index numbers for each quota period in comparison with the index numbers for the base month. The materials cost quota for each quota period shall then be multiplied by the percentage of change for such quota period, and the result will be applied as an increase or decrease in the contract price; *Provided*, That the total of such increases in the contract price shall [fol. 141] not exceed the amount by which the actual cost of "direct materials to be purchased hereunder" exceeds the total "estimated adjustable materials cost," and that the total of such decreases in the contract price shall not exceed the amount by which said total actual cost of "direct materials to be purchased hereunder" is less than the total "estimated adjustable materials cost."

(c) General.

(1) For the purpose of determining increases or decreases in contract prices, rates of change in average hourly earnings and rates of change in the materials index number will be calculated to the nearest one-tenth of one percent, and there shall be used the latest figures which shall have been issued by the Bureau of Labor Statistics up to the close of the fourth month following the last quota period under this contract.

(2) Payments for increases, or deductions for decreases in the contract price, resulting from the operation of this

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[2] The index for the commodities group which includes the items making up the major portion of the "direct materials to be purchased hereunder."

article, will be made after the completion of the calculations of price adjustments in accordance herewith; *Provided,* That the Government may, from time to time during the life of the contract, make partial payments on account of such increases, subject to such requirements as a condition precedent to such payments as the Contracting Officer may provide; *Provided, further,* That in this event such partial payments shall exceed the amount due to the Contractor by the operation of this article, the Government shall deduct the amount of such excess from any further payments due under this contract.

(3) Should the Contractor, during the performance of this contract, on account of subcontracting, or otherwise, depart from the production methods upon which the estimates and schedules of direct labor and direct materials [fol. 142] costs were based to such an extent that the use of such estimates or schedules will operate to produce an unfair adjustment of the contract price, a corresponding correction in such estimates or schedules may be made by mutual agreement between the Contractor and the Contracting Officer. In the event of disagreement with respect to the need for or extent of such correction, the procedure of Article 12 (Disputes) shall apply.

(4) If this contract is terminated pursuant to any provision thereof the contract price shall be adjusted as provided above, except that for the purposes of paragraphs (a) (2), (a)(3), (b)(2), and (b)(3), the terms "estimated direct labor cost" and "estimated adjustable materials cost" shall be understood to refer to that part of such costs which corresponds to that proportion of the supplies contracted for which is completed and delivered by the Contractor, and the terms "actual direct labor cost" and "actual cost of direct materials to be purchased hereunder," shall refer only to that part of such costs which is properly chargeable to the supplies completed and delivered.

(5) The Contractor shall file with the Contracting Officer, not later than sixty days after the completion of the performance of the work under this contract or after its termination, a statement of the actual direct labor costs and the actual costs of "direct materials to be purchased hereunder," certified as correct by an independent public accountant approved by the Contracting Officer, showing the

amounts of such costs properly chargeable during each quota period and, in case of termination, the amounts properly chargeable to the supplies completed and delivered. In determining the total actual direct labor cost and the total [fol. 143] actual "direct materials to be purchased hereunder," and in determining the amounts thereof to be charged in each quota period, the Contractor may, subject to the approval of the Contracting Officer and to the limitations of paragraph (b) (2), employ the accounting system regularly employed in the Contractor's plant. Such statement shall be deemed prima facie correct. The Government reserves the right to audit the books and records of the Contractor, to determine the accuracy of such determinations and certification, and to obtain any information in connection with the operation of this Article. All information obtained from the Contractor's records shall be treated as confidential. The Contractor shall preserve all the books, papers, and other accounting records pertaining thereto; *Provided,* that if the Contractor at any time after the lapse of three years following the completion or cessation of work under the contract, desires to dispose of said books, papers, and accounting records, he shall so notify the Secretary of War, or his duly authorized representative, who shall either authorize their destruction or notify the Contractor to turn them over to the Government for disposition.

[fol. 144] EXHIBIT D

War Department, Office of the Under Secretary
Washington, D. C.

December 17, 1941.

PC-L 162. P. & C. General Directive No. 86. Memorandum for: The Chief of the Air Corps. The Chief, Chemical Warfare Service. The Chief of Coast Artillery. The Chief of Engineers. The Chief, National Guard Bureau. The Chief of Ordnance. The Quartermaster General.

The Chief Signal Officer. The Surgeon General.
Copy to: The Judge Advocate General—for information.
Subject: Amendment to Price Adjustment Clause.

1. Reference is made to the form of escalator clause approved by the Under Secretary of War on September 13, 1941, accompanying P. & C. General Directive No. 48.

2. It has been determined that the escalator clause should be amended so as to provide for adjustments on account of changes in pay-roll taxes, and therefore, the approved form of escalator clause will be amended by adding the following provision thereto as paragraph (c) (6):

> If after the date on which the prices herein were quoted, the Congress or any state legislature, shall impose, remove, increase or decrease any pay-roll tax required to be borne by the contractor and directly [fol. 145] applicable to or measured by the pay-rolls of the contractor hereunder, then the rate of such newly imposed tax, or the net increase or net decrease in the rate of a previously imposed tax, shall be multiplied by that portion of the actual direct labor cost which is subject to such increases or decreases in the tax or taxes, and the result shall be paid the contractor under this paragraph.

3. It has also been determined that the escalator clause should be amended so as to provide for adjustment on account of changes in indirect labor and indirect material costs. Accordingly, the following amendments to the approved form of escalator clause will be made:

a. As a second sentence to Paragraph (a) (1), add the following:

"It is also estimated that the indirect labor cost attributable to this contract is .....% of such estimated direct labor cost."

b. Add the following as Paragraph (a) (4):

"The total increase or decrease to be paid or deducted under Paragraph (a) (3) shall be multiplied by .....% [1] and the result shall be applied as a further increase or decrease in the contract price, as an adjustment for the indirect labor cost under this contract."

c. Add the following as the second sentence in Paragraph (b) (1):

"It is also estimated that the indirect materials cost attributable to this cotnract is .....% of such estimated direct materials cost."

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[1] The percentage of indirect labor cost stated in Paragraph (a) (1).

d. Add the following as Paragraph (b) (4):

"The total increase or decrease to be paid or deducted under Paragraph (b) (3) shall be multiplied by [fol. 146] .....% [2] and the result shall be applied as a further increase or decrease in the contract price, as an adjustment for the indirect materials cost under this contract."

4. In negotiating the estimated direct labor cost, the percentage thereof represented by indirect labor cost, the estimated direct material cost, and the percentage thereof represented by indirect material cost, the Contracting Officer should consider, among other things, the following factors:

a. The amount of the estimated direct labor cost and the amount of the estimated direct materials cost should be limited in accordance with the definitions of direct labor and direct material costs contained in paragraphs (a) (1) and (b) (1) of the escalator clause, and should not include any amounts for indirect labor or indirect material costs;

b. The total of the estimated direct labor cost and the estimated direct material cost, together with the amounts obtained by the application of the percentages set forth for indirect labor and indirect materials, should bear a reasonable relation to the total contract price. In any case where the difference between the total of these amounts and the contract price does not leave a reasonable margin to cover profit, rent, depreciation, taxes, and similar costs not included in the labor or material costs factors, it will be apparent that the estimates are too high, and should be accordingly reduced.

By direction of the Under Secretary of War:

(S) John W. N. Schulz, Brigadier General, U. S. Army, Director of Purchases and Contracts.

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[2] The percentage of indirect materials cost stated in Paragraph (b) (1).

[fol. 147] EXHIBIT E

War Department Price Adjustment Board
Policy and Procedure

Purpose of the Board.

The Price Adjustment Board will serve as a focal point for the review of contracts existing between the War Department and its contractors. Its duties will be to make sure that the War Department is doing an economical job of purchasing and that contractors are not making excess or unreasonable profits on war orders. In its review of contractor profits the Board will endeavor to eliminate from contractor cost calculations exhorbitant items of whatever nature.

The Board will assist the Services in securing an adjustment in contract prices that will accomplish the foregoing objectives.

The Board will also serve contractors who feel that their contract prices are such that a likelihood exists that they will make excessive or unreasonable profits. It will invite war contractors finding themselves in this position to consult with it for the purpose of arriving at a fair and equitable voluntary adjustment.

Operating Policies.

The following principles will be observed by the Price Adjustment Board in dealings with contractors:

1. The Board will endeavor to arrange for a readjustment in contract price or to obtain a return of payments made pursuant to a contract to the extent which will result in limiting the contractor to a fair and reasonable profit.

2. In judging the reasonableness of profit, the Board will consider:

[fol. 148] (a) the total profit made by the contractor before allowance for federal income and excess profit tax.

(b) the amount of profit per unit based on estimated or actual cost.

3. In determining the estimated or actual cost per unit of performance of the contract, the Board will give consideration to all items of cost, including the following:

A. Factory Cost:

1. Direct materials
2. Direct productive labor
3. Direct engineering labor
4. Miscellaneous direct factory charges
5. Indirect factory expenses

Total Factory Cost

B. Other manufacturing cost
C. Miscellaneous direct expenses
D. Indirect engineering expenses
E. Expenses of distribution, servicing and administration
F. Guarantee expenses

4. The Board will in general be guided by the cost accounting system regularly utilized by the contractor, except that the Board will, in appropriate cases, disallow salaries, bonuses or other expenditures which are clearly excessive.

5. In determining the amount of profit to be viewed as reasonable, the Board will give proper consideration — the following:

A. The first factor in determining the attitude of the Board toward the contractor will be based on the contribution that the contractor has made and is mak-
[fol. 149] ing to the completion of the war production program.

B. Whether the contract is performed in whole or in part with facilities furnished by or financed by the Government.

C. The amount of invested capital employed by the contractor in the performance of the contract.

D. The ratio between this investment and sales volume.

E. The period of time required to perform the contract.

F. The complexity or simplicity of the manufacturing operations involved.

G. The presence or absence of exceptional risks to be borne by the company.

H. The degree of skill and management and organization required of the contractor. In this connection special attention will be paid to the extent to which the Government has been called upon to arrange for furnishing "know-how" to the contractor.

I. The contribution that the contractor has made to the technical improvement and development of war matériel and production methods.

J. Special consideration will be given those contractors who have assisted other producers in performing a better job.

6. In cases where performance has been substantially or wholly completed, consideration will be given to the extent to which the contractor has met or anticipated delivery schedules.

7. The Board shall not be limited to the foregoing factors but may give consideration to any other factors which in its judgment are reasonably applicable.

[fol. 150] Method of Operation.

Information as to concerns making unreasonable profits or those paying excessive salaries or bonuses, or setting up excessive reserves, etc., will be obtained by the Board from the services, Division of Budget & Financial Administration, Contract Clearance Branch of the War Production Board, or any other sources.

All costs analyses are to be prepared by the Division of Budget and Financial Administration.

When the contractor is working for the Navy or the Maritime Commission as well as the Army, that department which has been assigned to the contractor will take charge of the case.

The Price Adjustment Board function will be completed when an agreement is arrived at with the contractor setting a limiting figure that shall be considered a reasonable profit before federal income and excess profit taxes. From this point forward, it is contemplated that the contractor will renegotiate contracts with the Service or Services involved so as to bring its total profit down to the agreed upon figure.

Exhibit F

Memorandum

Pursuant to Executive Order No. 9127, dated April 8, 1942, and for the purpose of controlling profits and costs under war contracts through adjustments with contractors, there have been established with the War Production Board, the War Department, the Navy Department and the Maritime Commission cost analysis sections. Further to implement control of costs and profits on war contracts, the following procedures will be established:

1. The War Department and the Navy Department and the Maritime Commission will each create a board [fol. 151] to be known as the Price Adjustment Board of the War Department, the Navy Department, or the Maritime Commission, as the case may be, to advise and assist the official in such Department or Commission in charge of purchasing, in securing adjustments or refunds in instances where it is determined that costs or profits of contractors are, or may be, excessive for any reason. Each board shall exercise such other powers not inconsistent with this order as may be delegated to it by the Department or Commission which created it.

2. The Chairman of the War Production Board shall recommend a representative for appointment to each board. The Price Adjustment Boards may have one or more members in common.

3. The Cost Analysis Section of the War Production Board will conduct general surveys of the profits and costs of holders of war contracts and industry-wide studies of a like nature, either upon the request of one of the Price Adjustment Boards, or of the Cost Analysis Section of any Department, or upon its own initiative.

4. The Cost Analysis Sections of the War Department, Navy Department and the Maritime Commission will act as fact finding agencies for the Price Adjustment Boards and will upon the request of any Price Adjustment Board conduct investigations into the cost

and profits of any contracts in which Departments or the Commission are interested. Any such investigation made upon the request of a Price Adjustment Board will be in such form and in such detail and will include such subject matter as such Price Adjustment Board may require. The Departments and the Commission will cooperate with each other in order to avoid dupli- [fol. 152] cating investigations of common contractors.

5. All cost analysis reports and all information obtained from contractors or otherwise by the various Cost Analysis Sections including that of the War Production Board and all information and records of the various Price Adjustment Boards will be available at all times to each of the Price Adjustment Boards and to each of the Cost Analysis Sections.

6. The Cost Analysis Sections of the War Production Board and of the Departments and the Commission are authorized to make use of the facilities of the Treasury Department, Securities and Exchange Commission; Federal Trade Commission and other proper departments or agencies of the Government in securing and assembling information.

7. Each Price Adjustment Board may establish such policies and procedures for the administration of its proceedings as it may deem proper. Every effort shall be made to keep the procedure of each board simple and flexible. Each board shall keep a written record of each action taken by it. Each board may delegate to any one or more of its members the power to initiate investigations, request information and assistance on behalf of the board and to represent the board in negotiations with contractors.

8. Where contractors have contracts with both Departments or with one or both of the Departments and the Commission, the Price Adjustment Boards of the Department or Commission involved shall agree as to how and by whom the negotiations shall be conducted. [fol. 153] 9. No audit shall be made by any Department or the Commission pursuant to Executive Order

No. 9127 without first advising the Cost Analysis Section of the War Production Board.

(Signed) Robert P. Patterson, Under Secretary of War; Forrestal, Under Secretary of Navy; E. S. Land, Chairman, Maritime Commission.

Approved:

(Signed) D. M. Nelson, Chairman, War Production Board.

EXHIBIT G

War Department, Washington

April 25, 1942.

Memorandum for Directors of all Staff Divisions, Services of Supply. Chiefs of All Supply Services. Chief of Each Administrative Service. Commanding Generals of All Corps Areas.

Subject: Price Adjustment Board, Services of Supply.

1. There is created within the Services of Supply a Price Adjustment Board.

2. The mission of the Price Adjustment Board shall be to advise and assist the Chief of the Purchase Branch, Procurement and Distribution Division, in securing adjustments and refunds in cases where it is thought that costs or profits of War Department contractors are or may be [fol. 154] excessive by reason of the payment of excessive salaries or bonuses or for any reason.

3. The members of the Board will be selected by the Commanding General, Services of Supply, with the approval of the Under Secretary of War. One member will be selected with the approval of the Chairman of War Production Board, as his representative.

4. The Board is instructed wherever appropriate to function jointly with representatives or agencies of the Navy Department, Maritime Commission, and other Departments or agencies of the Government.

5. The Board will receive from the Cost Analysis Section of the War Production Board, the Cost Analysis Section of

the Fiscal Division of the Services of Supply, the Supply Services, the Army Air Force, and from any other source, information with respect to contractors who are thought to have excessive costs, to be making excessive profits, or to be paying excessive salaries or bonuses.

6. (a) The Cost Analysis Section of the Fiscal Division of the Services of Supply shall upon request of the Board make such audits and analyses as may be designated by the Board and shall secure for the Board from the Treasury Department, the Securities and Exchange Commission, the Federal Trade Commission, and from any other Department or agency of the Government, or from the contractor involved, such additional information as the Board may request in order to expedite and assist it in the performance of its functions.

(b) All Divisions and personnel of the Services of Supply and the Army Air Force shall furnish such information and assistance to the Board as it may request or as may appear desirable to aid it in the performance of its functions.

[fol. 155] (c) To effect full coordination between the Services of Supply, the Army Air Force, and other Departments and to insure a uniform policy, price reductions which are offered to or contemplated by, the Services of Supply and the Army Air Force will be referred to the Chief of the Purchases Branch.

7. The Board is authorized to delegate to any one or more of its members the power to initiate investigations and request information and assistance on behalf of the Board and to represent the Board in negotiations with contractors. The Board shall develop such other policies and procedures as it may deem advisable in performing its functions and accomplishing its purposes.

8. The Board shall report to the Chief of the Purchases Branch, Procurement and Distribution Division, Services of Supply, its recommendations for adjustments with contractors. These recommendations, if approved by the Chief of the Purchases Branch and the Director or Deputy Director of the Procurement and Distribution Division, Services of Supply, shall be transmitted to the Services concerned for the purpose of effecting any renegotiation or revision

of contracts required in order to carry out such recommendations.

(Sgd.) Brehon Somervell, Lieutenant General, Commanding.

Approved: April 25, 1942.

(Sgd.) Robert P. Patterson, Under Secretary of War.

[fol. 156] EXHIBIT H

War Department, Headquarters, Services of Supply
Washington

March 13, 1942.

SP-PB-ppp 300.4. P. B. General Directive No. 31. To: The Chief, Chemical Warfare Service. Chief of Engineers. Chief of Ordnance. The Quartermaster General. Chief Signal Officer. The Surgeon General. Commanding General, Transportation Division. Commanding Generals, all Corps Areas. Commanding Officers, General Depots.

Subject: Use of Price Renegotiation Clause in Fixed Price Contracts.

1. It is essential to eliminate all delays in the production of items immediately required which result from the time required for the negotiation of fixed price contracts. In any case where in the opinion of the Contracting Officer it is desirable that the Contractor immediately commence production or preparation therefor, the Letter Purchase Order prescribed by P. & C. General Directive No. 5, dated January 13, 1942, may be issued pending such negotiation. Where actual production and delivery may occur prior to the execution of the contract, the words "partial payments and" or words of substantially similar import may be inserted in paragraph 4 of such Letter Purchase Order before the words "advance payments."

[fol. 157] 2. Where a Letter Purchase Order is employed in accordance with paragraph 1 hereof, the contract should be negotiated at the earliest possible date even though final determination of price is impracticable at that time, and

provision should be made in the contract for redetermination or renegotiation of the price, as authorized herein.

3. The Contracting Officer, in order to facilitate the execution of the contract and the commencement of work thereunder, may, pursuant to the authority of the First War Powers Act, 1941 (Public 354, 77th Cong.) and Executive Order #9001, insert in the contract and apply either of the following articles: (a) Redetermination of Price (Attachment 1), or (b) Renegotiation (Attachment 2).

4. It will be observed that Attachment 2 imposes upon the Contractor no legal obligation beyond that of furnishing a statement of actual costs and to renegotiate in good faith. Such statement will afford a basis for renegotiation of the contract price. On the other hand, Attachment 1 calls for the application of definite objective standards, thereby making the redetermination of price largely automatic rather than dependent upon renegotiation.

(Sgd) Brehon Somervell, Lieut. General, Commanding.

2 Incls:
Attach. 1,
Attach. 2.
Approved by:

Robert P. Patterson, Under Secretary of War.

Attachment No. 1.

Article ..... Redetermination of Price.

The parties hereto recognize that, because of circumstances beyond their control, accurate estimates of the cost [fol. 158] of performing this contract cannot be made within a reasonable time. Accordingly, they agree that the price stated in Article 1 shall be redetermined as provided below, upon the basis of the actual experience of the Contractor in performing part of his contract. Such redetermination of the price shall be made as follows:

(a) The estimated cost of performing this contract, upon which the price stated in Article 1 is based, is $....., itemized as follows: [1]

[1] This breakdown may be altered to suit particular circumstances.

A. Factory Cost:

1. Direct materials
2. Direct productive labor
3. Direct engineering labor
4. Miscellaneous direct factory charges
5. Indirect factory expenses [2]
   (State basis of allocation)
   Total Factory Cost

B. Other manufacturing cost
C. Miscellaneous direct expenses
D. Indirect engineering expenses
E. Expenses of distribution, servicing and administration
F. Guarantee expenses

(b) It is agreed that the cost of production of the first .....% of items called for hereunder, hereafter referred to as the "preliminary run" will not necessarily be typical for the remainder of the contract. The cost of production of the next .....%, hereafter referred to as the "test run" [fol. 159] shall be used as the general basis for redetermination. Within ..... days after the completion of the production of the "test run", the Contractor shall submit to the Contracting Officer separate statements of the actual cost of the production of the "preliminary run" and the "test run", itemized in the same way as the estimated cost stated above. Such statement shall be based upon the cost accounting system regularly utilized by the Contractor and certified as correct by an independent public accountant or by two officers of the Contractor. The Contractor shall submit his books and accounts to such examination and audit as shall be requested by the Contracting Officer.

(c) If the actual cost of production of the preliminary run plus the cost of the production of the remainder of the items called for by the contract, as indicated by the actual cost of production of the "test run", is less than the total estimated cost stated in paragraph (a), the total

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[2] State separately the estimated amount of each of the following items included:
(a) Normal depreciation.
(b) Special amortization.

price to be paid pursuant to Article I shall be reduced in the same ratio.

(d) Pending the redetermination of the price hereunder, all items delivered shall be paid for at the price set forth in Article 1. Upon the redetermination of such price hereunder, an amount equal to the difference between the price paid on all items theretofore delivered and such redetermined price for such items shall be applied by the Contractor as a credit against payment for subsequent deliveries, or shall be applied or returned to the Government as directed by the Contracting Officer.

(e) If this contract contains an escalator clause (Price Adjustment), notwithstanding any provisions of such escalator clause which may be inconsistent herewith, that clause shall be understood to relate only to that portion of the production under the contract which is not covered by the [fol. 160] statements of actual cost required by paragraph (b) of this article. The blanks in the escalator clause will be filled in at the time of redetermination hereunder, and the month in which the redetermination is made shall be taken as the base month for such escalator clause and the estimated labor costs and the estimated material costs shall include only such costs as are not reflected in the actual cost statements. For this reason the blanks in the escalator clause were not filled in at the time of the execution of this contract.

Attachment No. 2:

Article ..... Renegotiation.

(a) The Contractor represents that the contract price provided in Article ..... is based upon a total estimated cost of $..... itemized as follows: [1]

A. Factory Cost:

1. Direct materials
2. Direct productive labor
3. Direct engineering labor

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[1] This breakdown may be altered to suit particular circumstances.

4. Miscellaneous direct factory charges
5. Indirect factory expenses.[2]
(State basis of allocation)
Total Factory Cost

B. Other manufacturing cost
C. Miscellaneous direct expenses
D. Indirect engineering expenses
E. Expenses of distribution, servicing and administration
F. Guarantee expenses

[fol. 161] (b) Within ..... days after the completion of the production of .....% of the items called for under this contract, the Contractor shall submit to the Contracting Officer a statement of the actual cost of the production of said percentage, itemized in the same way as the estimated cost stated above. Such statement shall be based upon the cost accounting system regularly utilized by the Contractor and certified as correct by an independent public accountant or by two officers of the Contractor. The Contractor shall submit his books and accounts to such examination and audit as shall be requested by the Contracting Officer.

(c) Upon the written request of either party, which request shall be made within ..... days after the filing of the statement required by paragraph (b) hereof, the Contracting Officer and the Contractor will enter into negotiations and will attempt to agree upon a modification of the contract.

(d) Pending the renegotiation of the price hereunder, all items delivered shall be paid for at the price set forth in Article 1. Upon the renegotiation of the price hereunder, an amount equal to the difference between the price paid on all items theretofore delivered and such renegotiated price for such items, if in the Government's favor, shall be applied by the Contractor as a credit against payment for subsequent deliveries, or shall be applied or re-

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[2] State separately the estimated amount of each of the following items included:
(a) Normal depreciation.
(b) Special amortization.

turned to the Government as directed by the Contracting Officer; if in the Contractor's favor, it shall be paid by the Government on a separate invoice or voucher.

(e) If this contract contains an escalator clause (Price Adjustment) the figures set forth therein and the terms thereof shall be controlling in the absence of a modification of the contract under this article. In the event of such a modification, the escalator clause shall be so modified as to relate only to that portion of the production under the con- [fol. 162] tract which is not covered by the statement of actual cost required by paragraph (b) of this article. In modifying the provisions of the escalator clause, the month in which the renegotiation occurs shall be taken as the base month, and the estimated labor costs and the estimated material costs shall include only such costs as are not reflected in the actual cost statement submitted under paragraph (b) hereof.

EXHIBIT I

Joint Resolution to Provide for the Renegotiation of Contracts for the Production of War Materials for the Purpose of Limiting Profits Thereunder

Whereas it is imperative that effective measures be taken to limit the profits paid to contractors obtaining contracts for the production of war materials; therefore, be it

Resolved by the Senate and the House of Representatives of the United States, in Congress assembled, That—

1. The Secretary of War is directed to insert in any contract hereafter made by the War Department, which, in his judgment, may result in an excessive profit to the contractor, a provision for the renegotiation of the contract price at a period when the profits can be determined with reasonable certainty.

2. The Secretary of War is directed, whenever in his opinion excessive profits have been realized, or are likely to be realized, from any contract with the War Department, to require such contractor to renegotiate the contract price. This provision shall be applicable to all contracts hereafter made and to all contracts heretofore made,

whether or not such contracts contain a renegotiation clause, provided that final payment has not already been made [fol. 163] pursuant to such contract.

3. In renegotiating a contract price the Secretary of War shall not make allowance for any salaries, bonuses, or other compensation paid by the contractor to its officers or employees, in excess of a reasonable amount, nor shall he make allowance for any excessive reserves set up by the contractor, and the Secretary of War shall freely use the powers of audit conferred upon him by existing law for the purpose of ascertaining whether such unreasonable compensation has been or is being paid, or whether such excessive reserves have been set up.

4. In addition to the powers conferred by existing law, the Secretary of War shall have the right to demand of any contractor who holds uncompleted contracts with the United States for the production of war materials in the aggregate amount of $500,000 or more statements of actual costs of production and such other financial statements, at such times and in such form and detail as the Secretary of War may require.

5. The authority and discretion herein conferred upon the Secretary of War may be by him delegated to such individuals or agencies in the War Department as he may designate and he may authorize such individuals to make further delegations of such authority and discretion.

6. The foregoing provisions shall be applicable to the Secretary of the Navy in the case of contracts with the Navy Department, and to the Chairman of the Maritime Commission in case of contracts with that Commission. The powers conferred by paragraph 4 above shall be exercised by the War Department, the Navy Department, or the Maritime Commission, whichever holds the largest aggregate amount of uncompleted contracts for the production of war materials.

[fol. 164] IN UNITED STATES DISTRICT COURT

[Title omitted]

[File endorsement omitted.]

AFFIDAVIT OF H. STRUVE HENSEL—Filed June 11, 1945

[fol. 165] H. Struve Hensel, being first duly sworn, deposes and says:

1. I have been Assistant Secretary of the Navy since January 30, 1945. The Secretary of the Navy has delegated to me, as Assistant Secretary, the general supervision over all of the procurement activities of the Department of the Navy. I was appointed a Special Assistant to the Under Secretary of the Navy in January 1941 and was appointed Chief of the Procurement Legal Division upon the formation of that Division in July 1941. When the name of the Procurement Legal Division was changed to the Office of the General Counsel for the Department of the Navy in August 1944, I was appointed General Counsel, which position I held until my appointment as Assistant Secretary. As Chief of the Procurement Legal Division and General Counsel, I had general supervision over all of the procurement legal matters in the Department of the Navy and supervised the drafting of Navy contracts.

2. The statements made in this affidavit are based upon information received by me in my official capacity and which I believe to be true and accurate.

I. Scope and Complexity of Navy Procurement

3. The armed services in December 1941 were faced with procurement problems on a scale beyond anything which they had theretofore experienced. The problems of allocating materials and manpower were enormous. The Army and Navy urgently needed ships, planes, tanks and other munitions of every kind, regardless of cost. The logistics requirements had changed so much and so swiftly with the outbreak of war that the available data on the Govern-

[fol. 166] ment's previous procument were of very little assistance in fixing prices which would closely reflect the ultimate costs.

4. Prior to the emergency period, all Navy contracts were let as the result of competitive bidding. The first step away

from this requirement was taken in the Act of April 25, 1939, when the Congress authorized construction of naval facilities on island bases on a cost-plus-a-fixed-fee basis. In the next fifteen months several further authorizations were enacted allowing the negotiation of cost-plus-a-fixed-fee contracts for construction.

5. The first major expansion in the Navy's war-procurement planning was in June 1940. Upon the fall of France and the Low Countries, the Congress voted to make substantial additions to the United States Fleet. By December 1941, Navy procurement programs had been accelerated as demands from the Fleet became more imperative. After December 7, 1941, the procurement tempo skyrocketed. So many different items were needed in such large quantities, by both the War and Navy Departments, that the Navy Department felt compelled to give a commitment to almost any manufacturer who demonstrated ability to perform the work.

6. In June and July, 1940, the authorized strength of the Navy was approximately doubled. The "11 per cent Expansion Act" of June 14, 1940 and the "70 percent Expansion Act" of July 19, 1940 (the Two-Ocean Navy Act) were passed in recognition of the threats to this nation's security implicit in the German victories. These authorizations of increased Navy strength were accompanied by grants of contract authority and the necessary appropriations. The Act of June 28, 1940 (Public No. 671, 76th Congress) granted limited authority to negotiate contracts for vessels, propulsion machinery and equipment, and also granted the [fol. 167] necessary authority to construct facilities to build the vessels and munitions. Requests to the Congress for authority to negotiate contracts had emphasized that the Navy had need for utilizing the services of all shipbuilders, all manufacturers of naval ordnance and other munitions, rather than the services of only those making the lowest bids. In point of fact, the contracts let by the Bureau of Ships in late 1940 and the first half of 1941 to carry out the additions to the Fleet authorized by the Congress, in large part tied up the existing naval shipbuilding capacity of the nation. Although new shipbuilding facilities were being constructed and completed throughout the last half of 1940 and 1941, it was not until early 1942 that the

completion of vessels on the ways and the availability of the new shipbuilding facilities made possible the execution of another large group of shipbuilding contracts.

7. The vastness of the procurement programs in 1941 and the early part of 1942, as compared with earlier programs, tended to subordinate all other considerations to the single factor of getting the munitions. The Navy did not during this period have any mechanisms for determining close contract prices or for controlling profits under its contracts. More important, neither the Navy personnel responsible for procurement nor the contractors had any experience to enable them to gauge profits accurately. Many contractors were making new items which had never before been manufacturd in this country. Manpower problems began to be acute with the acceleration of inductions under the Selective Service Act. No one had any idea as to what effect manufacture of ordnance and other items by the thousands instead of by single items or in small lots would have on profits. It proved generally impossible to make allowance [fol. 168] in advance for increased efficiency gained from experience, and the greater profits, resulting from increased volume. In instance after instance the Navy found that costs and profits seemingly reasonable at the start of the contract became unreasonable after volume and experience had increased. The important contracts were so large that a small margin of error in computing prices could wipe out the contractor's capital. Conversely, allowances for contingencies, intended only for protection, often turned into unexpected profits. Finally, Navy personnel during this period were more interested in getting the munitions than in limiting profits under the contracts for such munitions.

a. Contract Statistics

8. The scope of the problem of acquiring naval supplies and equipment at reasonable prices can be discovered by examination of some Navy statistics for this period.

i. Commitments and expenditures

9. For the calendar years 1940-1944, the Navy's commitments and expenditures of appropriated funds were as follows (in billions of dollars):

	Fiscal, 1940	Fiscal, 1941		Fiscal, 1942		Fiscal, 1943		Fiscal, 1944	
	7-1-39 to 6-30-40	7-1 to 12-31-40	1-1 to 6-30-41	7-1 to 12-31-41	1-1 to 6-30-42	7-1 to 12-31-41	1-1 to 6-30-43	7-1 to 12-31-43	1-1 to 6-30-44
Commitments	$1.1	8.5	4.2	6.0	17.2	13.8	13.0	12.2	12.0
Expenditures	....	0.9	1.7	2.8	6.2	7.6	13.8	12.2	14.9

The commitments represent roughly the amount of contract obligations (including letters of intent) executed; plus amounts for pay, subsistence and transportation of naval personnel (for the fiscal years 1941 to 1944, inclusive, expenditures for these purposes, in billions of dollars, were 0.32, 0.65, 2.01 and 4.8 respectively). It will be noted that *commitments* in the first half of 1942 almost tripled those [fol. 169] of the latter half of 1941, and that *expenditures* in the first part of 1942 were more than double those of the earlier period. Futhermore, both commitments and expenditures for the second half of 1941 had gone up very considerably over those of the first half of 1941.

ii. Number and size of contracts

10. The following figures indicate the vast increase in procurement contracts during the months of the fiscal year 1942 beginning July 1, 1941 up through April 30, 1942. The figures include all new work awarded, consisting of all new contracts, letters of intent and extensions of existing contracts. Letters of intent were the informal (but nonetheless binding) contracts awarded to a manufacturer in order to authorize him to get started on the work in advance of the time when detailed contracts terms or prices could be worked out. They were often used when specifications were not completed, when it was necessary to finance the contractor immediately, or when the detailed terms—including often intricate payment provisions and delivery schedules—might take a long time to negotiate.

($1,000,000's)

	1941						1942			
	July	Aug.	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	Apr.
Total dollar amount of awards	$662.8	342.1	565.6	414.1	487.1	1,026.3	1,372.9	2,927.5	2,202.9	1,953.8
Expenditures	.....	.....	.....	$450	400	700	600	700	1,100	1,200
Total number of awards over $50,000	541	473	434	587	604	749	1,083	1,085	1,344	1,727

[fol. 170] 11. The above figures are further broken down by Bureaus as follows:

($1,000,000's)

	1941						1942			
	July	Aug.	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	Apr.
NOd contracts (signed by Secretary—primarily facilities vessels)										
$ Amount	$73.6	40.0	121.8	79.9	4.9	50.0	37.9	6.3	10.1	33.7
No. over $50,000	32	31	40	26	7	23	21	15	15	38
NOrd Contracts (BuOrd)										
$ Amount	$12.3	23.7	13.2	11.0	61.5	27.2	58.7	35.9	99.4	138.4
No. over $50,000	8	9	8	22	36	26	25	27	70	87
NOs, NXs Contracts (BuSandA)										
$ Amount	$306.3	247.2	372.8	228.7	281.8	724.0	747.7	2,344.4	1,254.5	1,135.5
No. over $50,000	351	340	318	404	362	477	670	657	735	1,070
NOy Contracts (BuY&D)										
$ Amount	$264.4	25.9	55.4	100.3	110.4	101.4	143.4	145.1	184.2	331.5
No. over $50,000	128	66	80	120	167	180	230	251	380	326
NObs Contracts (BuShips)										
$ Amount	.....	.....	.....	$0.9	5.5	119.5	361.7	315.8	628.4	230.8
No. over $50,000	.....	.....	.....	2	15	26	61	78	96	116
NOa Contracts (BuAero—only facilities)										
$ Amount	.....	.....	.....	.....	$21.6	2.9	5.4	71.3	21.0	66.1
No. over $50,000	.....	.....	.....	.....	11	4	14	20	27	26
NOm Contracts (Marine Corps)										
$ Amount	$6.2	5.4	2.4	2.2	1.6	4.3	18.2	8.7	5.1	9.4
No. over $50,000	22	27	8	13	6	13	56	37	21	55

Throughout this ten-months' period, the Bureau of Supplies and Accounts executed all contracts for the articles specified by the Bureau of Aeronautics (except facilities) and for a great many of the articles specified by the other Bureaus. In September and October 1941, the Secretary delegated his power to execute negotiated contracts to the Chiefs of the several Bureaus; this fact accounts for the change in distribution of the contracts awarded following such months.
[fol. 171] iii. Decline in use of competitive bids

12. The following table shows the predominance of the negotiated contract as compared with contracts let after competitive bids during the period in question:

($1,000,000's)

	1941						1942			
	July	Aug.	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	Apr.
Competitive bids	$96.9	78.4	88.9	87.5	101.1	121.8	112.1	73.7	67.9	107.2
Negotiated contracts (including letters of intent and extensions of existing contracts)	$505.1	250.6	457.1	311.4	362.0	869.2	1,222.2	2,803.2	2,112.6	1,835.3

Under the old competitive bid contract, used prior to the emergency, there was almost no pricing problem—the contract was awarded to the lowest bidder. It is true that a modified system of competitive bids was used in the award of many negotiated contracts; the Department would request several manufacturers to submit, more or less informally, their estimated prices. The manufacturer submitting the low price would, other conditions being equal, receive the bulk of the Department's order for the item to be procured. In many cases, the Department would negotiate contracts with all of the manufacturers submitting prices; the high bidders would receive contracts for lesser quantities than the low bidders. Under this modified form of bidding, however, there was some negotiation in the arrival at the final contract price, and pricing was much more of a problem than it had been under the earlier system of competitive bidding.

iv. Dollar amount of letters of intent

13. The progressive increase in the use of letters of intent indicates the pressure which was being put upon contracting officers. The following table demonstrates the increasing reliance upon letters of intent:

[fol. 172]

(1,000,000's)

	1941						1942			
	July	Aug.	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	April
Total contracts awarded	$662.8	342.1	565.6	414.1	487.1	1,026.3	1,372.9	2,927.5	2,202.8	1,953.8
Letters of intent	$124.9	20.6	80.1	33.0	23.1	249.6	628.8	2,408.6	1,416.5	860.7
Previous months' letters of intent superseded by contracts executed	.....	.....	.....	.....	$48.2	57.6	26.1	53.7	223.7	297.9

The use of letters of intent in the Bureau of Ships is particularly striking:

Bureau of Ships—Contracts Awarded

($1,000,000's)

	1941	1942			
	Dec.	Jan.	Feb.	Mar.	Apr.
Total contracts awarded	$119.4	361.7	315.7	628.4	230.8
Letters of intent	$119.4	361.7	313.5	628.4	225.8
Previous months' letters of intent superseded by contracts	$0.3	.....	6.1	.....	.....

14. In conclusion, the contract figures for the fiscal year 1942, from July, 1941 until the passage of the renegotiation statute, show (1) a great increase in the amount of materiel contracted for, (2) virtual abandonment of competitive bidding as a method of awarding contracts and (3) an increasing use of the letter of intent.

b. General Factors Making Close Prices Difficult

15. A number of factors complicated the procurement programs at this time. These factors were more or less inevitable with the outbreak of war and the huge spurt in procurement.

i. Lack of experience

16. The enormous increase in procurement tells its own story. The Navy Department had no experience enabling it to cope with the problem of fixing close prices under the [fol. 173] new procurement programs. Contractors were being asked to produce items in quantities never before contemplated. Thus, in late 1940 and early 1941, contracts for vessels were let in quantities exceeding those of the first World War, and in early 1942, these quantities were still again increased. A single contract for one ordnance item (5" gun mounts) which had theretofore not been made outside Government gun factories, called for a quantity of such items in excess of the total number previously made in this country in the gun factories. Many other examples could be cited.

17. Contractors were called upon to manufacture new items which had never before been produced—such items as radar equipment, new plane and vessel designs, floating drylocks, and Bofors and Oerlikon guns. Specifications for some items were not completed until the contract was per-

formed; the requirements for other items were changed constantly through the life of the contract.

18. Many contracts were long-term contracts which extended for more than one year. The majority in dollar volume of combatant ship contracts were contracts for twelve months or more. Similarly, most of the contracts for construction of public works and facilities, and for air frames and engines were long-term contracts. The bulk in dollar amount of contracts let for these items in the *fiscal* year 1942, prior to passage of the renegotiation statute, ran until 1942 or 1943. Almost all aircraft and construction contracts were let on a cost-plus-a-fixed-fee basis. Of the contracts for vessels, a larger dollar amount were made on the fixed-price basis, but these fixed-price contracts were made subject to adjustment and escalation in respect of direct labor and material costs.

[fol. 174] 19. Contracts were awarded to many contractors, particularly in the aircraft industry, in amounts tens and even hundreds of times greater than their capital investments.

ii. Problems in building up procurement personnel and organization

20. For the fiscal year 1940, obligations of Navy appropriated funds totalled approximately 1.1 billion dollars; for the fiscal year 1941, obligations were about 12.7 billion dollars, (note the table in paragraph 9 above). In fiscal 1942 total obligations were 23.2 billion dollars, with obligations in the second half of such fiscal year (i. e., the first half of calendar 1942) amounting to 17.2 billion. The dollar volume of obligations incurred in the first six months of 1942 was comparable to the dollar volume of obligations incurred in the preceding two and one-half years (2.8 billion dollars less). The great jump in contract obligations which took place in the second half of 1940 was largely due to the great expansion in shipbuilding authorized in mid-1940, and, to a somewhat lesser extent, to the expansion in plane authorizations and construction of public works and facilities.

21. Within two years, the procurement machinery of the Navy had to be stepped up to the point where it could turn out, in a six-months' period, contracts for munitions for

about thirty-one times the dollar amount of the obligations incurred in the first half of 1940 (approximately $0.55 billion—50% of the $1.1 billion commitments recorded for the twelve months of fiscal 1940—as compared with $17.2 billion in the first six months of 1942). The difficulties of turning out the contracts for the widely diversified items procured by the Navy (from battleships to buttons, from planes to pork products) increased rather in a geometric progression as the dollar amount of Navy needs and the [fol. 175] number of Navy contracts necessary to fulfill such needs multiplied.

22. The Navy Department started its emergency procurement program in June, 1940, with personnel adequate to handle one billion dollars of procurement per year; it was impossible, within the year and one-half which followed, to build up the personnel who could handle procurement at the rate of 34 billion dollars per year (17.2 billion dollars for the first half of 1942), and at the same time achieve close pricing on the munitions for which contracts were being written. Even if there were in the country enough persons skilled in procurement problems and analysis of costs to undertake to fix close prices on munitions, such persons would have had no background of experience in the prices of a large proportion (if not most in dollar volume) of the items procured by the Navy. Not only was the Navy Department purchasing many items which had never before been made by the contractors, but it was also purchasing items in such quantities in 1941 and early 1942 that previous price experience was almost useless as a guide.

23. It is most important to recognize that pricing was only one of the factors which had to be considered by the Navy Department in expanding its procurement. The enormous increase in the number of technical personnel—engineers, architects, designers—required to handle the specifications for Naval material can be understood readily enough. Another factor too often overlooked is the mechanical problem of getting out completed contracts. The Bureaus, which prepared all of the contracts, had to set up entirely new contract organizations. The coordination of procurement by the Bureaus became increasingly difficult—what had been relatively simple when procurement was at the rate of one billion dollars a year became extremely com- [fol. 176] plex when procurement jumped twelvefold, and

then twenty-three fold. Many different efforts at coordination were made; the agencies most responsible for unifying contract polices—the Procurement Legal Division of the Under Secretary's Office and the Office of Procurement and Material of the Secretary's Office—were not established until July, 1941 and January, 1942, respectively. Organizations to assist contractors—in obtaining priorities, solving labor problems, building facilities, securing capital—all had to be established and manned, and it took time for such organizations to acquire the necessary know-how. Other organizations were required to coordinate Navy procurement policies and procedures with the policies and procedures of other Government agencies, to prevent the competition for contractors which helped to demoralize the early procurement of World War I.

24. The Navy Department had made a fair beginning towards solving these many problems at the time war was declared. The declaration of war, however, at the same time rendered imperative the immediate functioning of all of the agencies necessary to handle the procurement problems, and also made the problems much more acute. Through all of the process of organization for wartime procurement, the contracts had to be turned out, and in far vaster quantities than theretofore. One partial solution, of course, was the issuance of letters of intent rather than the more formal contracts, which could be worked out thereafter. The figures which I have cited earlier indicate the extent to which this device was used in the period under consideration. The use of letters of intent, however, merely postponed the day when the more formal contract was to be written; and at several times the backlog of letters of intent became perilously large. And the problem of pricing [fol. 177] still remained when letters of intent were used. The Department did issue some letters of intent under which prices were fixed, but as a general rule, the letters of intent were silent as to prices, with the understanding that prices would be set later in the definitive contract.

25. The Navy Department was struggling, throughout the year and one-half prior to passage of the renegotiation statute, to obtain personnel to get out the specifications, to write the contracts, and to aid in the production, of the material required. Indeed, we have not today completely

solved this problem—we still have need of experienced personnel who can take over the constantly changing procurement problems.

iii. Uncertainties as to costs

26. Added to the absolute lack of experience as to the cost of many items and the difficulties inherent in training personnel to meet new problems of theretofore unrivalled magnitude, were the many uncertainties as to certain costs—in 1941 and 1942 the scarcity of materials and of manpower, and rising prices and wages, made particularly difficult the forecasting of costs.

27. The problem of material shortages became acute in early 1942. The predecessor to the War Production Board had been established to administer the priorities authorized by the "Navy Speed-Up Act" of June 28, 1940. The Army and Navy Munitions Board had been working with the War Production Board and its predecessors for one and three-quarter years prior to April, 1942, in enforcing a system of priorities in metals for Government contracts. In the first half of 1942 the armed services and the War Production Board were engaged in working out a system of control much stricter than that theretofore in effect—the Produc- [fo. 178] tion Requirements Plan, which was put into effect on July 1, 1942. The application of all of the priority ratings was an immensely complicated job, which was administered in the Navy Department by the Production Branch of the Office of Procurement and Material. In addition to the metals covered by the priority schedules, there were several other raw materials which were at this time extremely critical because of shipping losses and other factors.

28. At this same time also, manpower shortages were beginning to be felt as the draft was stepped up enormously, although the shortage in manpower became most critical some months later.

29. The armed services had experienced some labor and wage troubles at the plants of contractors. The most acute cases were, of course, those of North American Aviation, Inc., which was taken over by the War Department under Executive Order No. 8773 dated June 9, 1941, and Federal Shipbuilding & Dry Dock Co., which was taken over by the

Navy Department under Executive Order No. 8868, dated August 23, 1941. Wages were rising, from early 1941 onward. In mid-1941, the Navy took the initiative in having the nation's shipbuilders enter into zone agreements with respect to labor. These agreements, while they helped to insure a supply of labor, had the undoubted effect of raising labor costs at most shipyards, including those not covered by the agreements, which tended to raise wages for all shipyard workers. There was also established a shipbuilding stabilization program reimbursement policy, to which the Navy Department, War Department and Maritime Commission adhered; the three agencies have from time to time issued administrative instructions governing reimbursement to shipbuilders of specific labor costs. Zone agreements somewhat similar to those in the shipbuilding [fol. 179] industry were likewise established for the construction and building-trades industries.

30. Wages continued to rise throughout late 1941 and the first part of 1942, and the trend was not effectively checked until after the President's "hold-the-line" Executive Order 9250 (promulgated upon passage of the Second Emergency Price Control Act of 1942 on October 2, 1942) which empowered the President to establish wage ceilings. Overtime charges began to mount in late 1941. As the War and Navy Departments demanded speeded-up production and extra shifts, they promised fixed-price contractors, who had not contemplated substantial overtime wages at the time their contracts were let, that the contract prices would be adjusted in the light of the overtime payments.

31. Scarcity of materials and growing scarcity of manpower made for higher costs to contractors. From the very inception of the national defense program, contractors were fearful of price rises which might wipe out not only their profits under long-term contracts, but also their entire companies. They were therefore insistent upon protection by the Government against such price rises. From the latter part of 1940 on, escalator clauses were demanded with increasing frequency under fixed-price contracts. In 1941 and early 1942, I should judge that the great majority in dollar amount of fixed-price contracts provided escalation in some form or another. Many contractors faced with the production uncertainties which I have outlined above, in addition

to price increases, insisted upon cost-plus-a-fixed-fee contracts to protect themselves.

32. Increases in production and in efficiency were so swift that in many cases the increased costs which had been anticipated and were to be covered by escalation were com- [fol. 180] pletely swallowed up in the greater than anticipated profits earned by contractors. It had been, and still is, generally impossible to forecast accurately the effects upon costs, of increased volume or of the productive efficiency of Navy contractors. In addition to this fact that contingent costs (against which escalation was provided) were offset by unanticipated profits, the fixed price under any contract containing an escalator clause invariably also contained allowances for many contingencies not covered by escalation. Escalator clauses did not provide complete protection against fluctuation in costs; there were at the time many uncertainties as to overhead costs against which the contractor claimed to have no protection except amounts for contingencies included in his contract price. In practice, price escalation worked only upwards, although the escalator clause generally did provide for revision downwards of prices based on direct labor and material costs, as well as for revision upwards thereof. The cost-plus-a-fixed-fee contract was virtually a riskless contract. As the production of so many contractors increased many times over, the return in profits under fees fixed upon the volume of their business amounted to vastly more on their capitalization than had profits prior to the emergency and war periods.

33. Manufacturers demanded protection against the uncertainties facing them; the Navy Department, which had no means of forecasting costs, of necessity had to provide the protection in its contracts in order to obtain the munitions. In general, Navy contractors in 1941 and early 1942 were including in their fixed-price or estimated cost (under cost-plus-a-fixed-fee contracts) allowances for almost all contingencies which could conceivably happen. Almost never did more than a portion of such contingencies happen with respect to a single contractor. In addition, production [fol. 181] techniques improved so much more rapidly than expected with respect to a great many items that actual costs in quantity procurement were far lower than those which might reasonably have been expected.

iv. Navy contracting and pricing personnel

34. As the statistics earlier cited make clear, most of the increased procurement from mid-1940 to April 1942 (and to date) has been accomplished under negotiated contracts. A very substantial proportion of these contracts were cost-plus-a-fixed-fee contracts, including almost all construction contracts and plant contracts; all facilities contracts provided for reimbursement of costs to the contractor. With respect to the fixed-price negotiated contracts, it was necessary to negotiate prices with the contractors on the basis of estimated costs. The cost of performance was to the extent possible based upon past experience, but past costs were generally stepped up by the inclusion of allowances covering the many uncertainties facing the contractor. The contractor would not undertake the work without adequate protection—and the Navy Department had no valid argument, in the light of the uncertainties as to costs facing the contractor, for rejecting allowances for the protection of the contractor. There was always the possibility, of course, that not all of the contingencies against which protection was being provided in the price would occur, but no one in the Navy Department or anywhere else was able to forecast what contingencies would occur and what ones would not. It is true that many of the fixed-price contracts provided escalation for certain costs, but the inclusion of escalation was necessary in such cases to provide the further cushion without which the contractor would not undertake to risk the hazards inherent in a fixed price.

[fol. 182] 35. Prices under contracts awarded after competitive bids were of little aid in determining prices for similar items under negotiated fixed-price contracts. Bidders for Navy contracts submitted bids on the basis of comparative prices and of what they anticipated would be the lowest price, rather than on any very close analysis of costs. In any event, the quantities specified in these earlier contracts and the conditions under which they were let did not afford any precedent for pricing in the later period. With the advent of the negotiated contract, more and more of the nation's industrial capacity was converted to Government work. Competitive forces ceased to have any bearing upon prices—in practical effect, all contracts let were based upon crude estimates of costs, however faulty the

early estimates might be, plus an additum for contingencies and profit. As the House Naval Affairs Committee discovered, prices under negotiated contracts were generally lower than prices for comparable items under contracts let to the lowest bidder.

36. At the beginning of the emergency period (June, 1940), the outlook of the Bureaus relative to prices was slanted almost entirely toward purchasing on the competitive bid basis. The Bureau of Supplies and Accounts continued to award some contracts during this period of early 1942 on the basis of competitive bids. Several of the Bureaus had personnel who dealt with comparative prices, based on past experience; such personnel sought to work out prices with contractors. The Bureau of Supplies and Accounts, which had been purchasing standard items in quantity for years, did have some comparative data on prices, based on the competitive bid awards. But, as procurement vaulted to quantities many times the quantities purchased before the war, this data became increasingly obsolete. It was true that the Stock, Schedule and Statis- [fol. 183] tical Sections of the Bureau kept records of past purchases and that such records would be of value in ascertaining the propriety of a negotiated fixed-price. The other Bureaus had only a handful of personnel engaged in drafting of contracts and pricing thereunder, and began in the latter part of 1940 to build up their contract divisions.

37. The new contracting personnel necessary to handle the increased volume of procurement, gradually gained experience with pricing; their training took time. At the start of the emergency procurement, there was on hand inadequate data as to contractors' costs, and consideration of prices offered by contractors was based largely on comparison with prices paid by the Navy for similar munitions in the past; usually under very different conditions. Past experience naturally offered little guide in the determination of prices to be paid for articles which had never been built before, as we discovered in the cases of destroyer-escorts and anti-aircraft guns, for example.

38. As of April 28, 1942 the Navy Department did not have any working organization whose primary responsibilities were analysis of prices and advice in the negotiation of accurate prices which when compared with costs would

not allow undue profits. The Cost Analysis Section and the Price Adjustment Board had just been established in the Office of Procurement and Material (itself organized on January 30, 1942) attached to the Secretary's Office, and had had little opportunity to accomplish anything in the way of recommending price reductions. There was no agency—and would not be until July or August, 1942, when the Price Negotiation Branch of Supplies and Accounts was set up—which was in negotiating a procurement deal solely [fol. 184] responsible for checking into the contractor's probable costs and for seeking to determine whether the prices submitted should be reduced. A lot of thought had gone into the matter of high prices and excessive profits, and we were slowly moving toward corrective measures which proved to be effective. It is true that before the war, almost half in dollar amount of negotiated contracts were let on a cost-plus-a-fixed-fee basis, or on a cost basis in the case of facilities, and a substantial portion of contracts were still being made to the lowest bidder after solicitation of competitive bids. Past experience was of little assistance in the latter case. Most of the large profits earned by Navy contractors were due to increased volume or ability of the contractor, making a new article with which he was unfamiliar, to reduce his costs promptly, and to allowances for contingencies which did not arise. The Navy Department did not have the pricing experience at this time to deal adequately with these factors. Again I want to point out quite frankly that the Department was primarily interested in getting the munitions as promptly as possible. In the haste to acquire the materiel of war, it had also to expand and develop its procurement organization. The Navy Department had at the time neither the knowledge nor the experienced personnel necessary to achieve close pricing—and indeed, during wartime, it may be doubted whether anything but limited success in negotiating prices to reflect costs can be achieved.

c. Specific Contract Prices During This Period (July, 1941-April, 1942)

39. Naturally, as contractors gained experience, and as the Navy became better able to analyze costs, it has been [fol. 186] possible to negotiate lower prices on a great many items. I have listed some of the factors which made for

high prices and high profits. I submit some actual examples of prices under contracts let during this period and subsequent reductions of these prices.

i. Bureau of Ships

40. The Bureau of Ships was responsible in 1941 and 1942 for the expenditure of a larger dollar volume of appropriations than was any other Bureau (although the Bureau of Supplies and Accounts in the months prior to passage of the renegotiation statute was writing a larger dollar volume of contracts, because of the large number of contracts such Bureau wrote upon requisition from the other Bureaus). The value of ships completed and converted under Navy contracts rose from about $142,146,000 in the second half of 1940, to $720,494,000 in the first half of 1942, to $3,590,509,000 in the first half of 1944. For the fiscal year 1941 (July 1, 1940-June 30, 1941), *expenditures* by the Bureau of Ships totaled $912,000,000, as compared with $3,074,000,000 for the next fiscal year, and $9,384,000,000 for the fiscal year 1944 (June, 1944, estimated).

41. The contracts necessary to fulfill the 11% and 70% expansions of the Navy (authorized by the Congress in June and July, 1940) were largely awarded by the end of the first quarter of 1941. In general, these contracts, which each specified the delivery of a number of combatant ships, were not completed until the latter part of 1942 and 1943. On the average, the following lengths of time are required to complete the several combatant ships:

Battleships	32 to 35 months.
Aircraft carriers	17 to 21 months. (The escort carriers require about 11 months.)
[fol. 186] Cruisers	22 to 25 months.
Destroyers	7 to 13 months.
Destroyer Escorts	7 months.
Submarines	11 months.

42. I have had compiled data on some 13 contracts executed between July 1940 and February, 1941, covering combatant ships. These contracts, all of which were made on a fixed-price basis, subject to adjustment according to

changes in direct labor and material costs, provided a total of $750,097,400 (before adjustment) of contract prices. None of these contracts was completed until late 1942 or 1943. They were completed at a total cost to the contractors of $514,720,566. The total profit under the contracts, disregarding adjustments and disregarding renegotiation and voluntary refunds, would therefore have amounted to $235,376,834, or 45.7% of the cost of performance. The cost of performance included increases in labor and material prices during the lives of the contracts, whereas the contract prices as above stated have not been adjusted upward in accordance with escalator adjustments to which the contractors would have been entitled under their contracts. Since the basic month for escalator purposes was between July, 1940 and February, 1941, and the expenditures were incurred from one to two years later, sharp upward adjustments would have been required if escalation had been computed —it is estimated that such adjustments would have amounted to 10 to 15% of the cost in the case of destroyers, and 15 to 20% of the cost in the case of the larger vessels. As examples of the discrepancies between original unit contract prices and unit costs to the contractor under these contracts, I cite the following:

[fol. 187]

	Number of Ships	Original Unit Price	Average Unit Cost	Difference as Percentage of costs
		Destroyer Program		
1st contract	6	$7,159,700	$5,445,225	31.5
2nd contract	6	6,813,200	4,560,674	49.5
3rd contract	8	5,379,000	4,705,896	14.3
4th contract	5	7,360,000	4,900,245	50.2
5th contract	17	6,813,000	4,425,605	53.9
6th contract	6	5,977,000	4,241,268	40.9
7th contract	4	5,579,000	4,620,142	20.8
		Carrier Program		
1st contract	2	43,662,000	26,625,000	64.0
2nd contract	1	42,725,000	26,500,000	70.6
3rd contract	3	46,125,000	26,600,000	73.4
		Cruiser Program		
	2	19,272,500	14,725,000	30.9
		Submarine Program		
1st contract	13	2,795,000	2,246,761	24.4
2nd contract	25	2,765,000	2,246,761	23.1

At the time of the award of the above contracts, there was an informal understanding between the Bureau of Ships and the contractors that if actual costs proved to be out of line with the prices fixed, some adjustments would be made. In practice, since none of these contracts was completed until after the passage of the renegotiation statute, all were renegotiated under the statute.

43. Both the destroyer-escort program and the landing-craft program were launched in force in early 1942, although the great majority of contracts for these vessels were not executed until after passage of the renegotiation statute. In neither case had the contractors or the Navy Department had any experience with building these new [fol. 188] types of vessels, and original costs were naturally high, because specifications were constantly changing on the early vessels. No contracts for destroyer-escorts were made prior to passage of the renegotiation statute. Work had been begun, however, on several of the vessels and general agreement on an estimated cost of $3,300,000 per vessel was reached in the first part of 1942. All of the contracts for these ships except one was made on a cost-plus-a-fixed-fee basis, and the resulting actual costs of the ships indicate the difficulty of arriving at a fair estimate for an item which has never been made before. Actual costs under eight contracts varied from $1,440,198 per vessel to $2,667,583 per vessel (the next highest being $2,348,578). The total fees fixed on the eight contracts amounted to 11.87% of the actual cost. Under the single fixed-price contract, which provided a unit price of $3,500,000, actual unit costs amounted to $1,809,644, or a profit without renegotiation of 93.4%. As I have earlier indicated, the contractor who took work on a fixed-price basis was entitled to cushions for the many contingencies which might arise and wipe out his profits. There was a definite agreement with respect to the destroyer-escort contracts that as costs were more accurately determined, prices and estimated costs would be adjusted accordingly. The Navy Department was in no position to insist upon the elimination of cushions from the price of a ship which had never before been built, with all of the uncertainties as to costs facing the contractor.

44. With respect to propulsion machinery, I shall repeat an example which was submitted by Secretary Knox to the Congress in April, 1942.[1] Secretary Knox said:

[fol. 189] For example, one of our suppliers with whom we had a contract for 200 destroyer turbines produced the first turbine on our designs at a cost of $2,559,000, which was very substantially above what that company's engineers had estimated the cost would be. After the production of 15 turbines, through economies of operation and increased efficiency, this cost was reduced to $607,000 per turbine. It is now estimated by the company that it will not be until after completion of the seventy-second turbine that the cost will drop to the figure estimated in quoting to the Navy the contract price of $300,000 per turbine. This latter cost the company believes will be stable.

ii. Bureau of Ordnance

45. During this period in question, a very large amount of ordnance items were procured under contracts made by the Bureau of Supplies and Accounts. *Expenditures* by the Bureau of Ordnance increased from $377,000,000 for the fiscal year 1941, to $1,915,000,000 for the next fiscal year and $3,634,000,000 for the fiscal year 1944.

46. Typical of the increases in volume of ordnance procurement is the jump in production under Navy contracts of one antiaircraft gun from approximately 1,000 in the last half of 1941 to about 10,500 in the first half of 1942; another gun jumped from 300 to 1,000 over the same two periods (top production of this item was reached in the second half of 1943 with 3,800 production). Production of Navy ammunition multiplied many times over in 1942.

47. The progressive reductions in prices of two types of antiaircraft guns which had not prior to the present emergency been manufactured in this country is most striking. These guns have been manufactured for the most part by [fol. 190] former automobile manufacturers, who had obviously had no prior experience in their production. The Oerlikon gun (20 mm.) with one type of mount was manu-

[1] Hearings before the House Naval Affairs Committee on H. R. 6790, 77th Cong., 2d Sess., April 16, 1942, page 2022.

factured under one contract made September 9, 1941 for a price of $7,531.42 per gun; under a contract dated January 20, 1943 with another manufacturer, its price had been reduced to $4,519.97, with a still different type of mount, a contract for the Oerlikon guns dated September 22, 1942 specified a unit price of $6,330; the later contract with the same manufacturer dated May 5, 1944 had brought the price down to $3,666. This same type of gun was made without mounts under a contract dated June 8, 1942, fixing a unit price of $4,958.50; the present contract with the same manufacturer dated May 5, 1944 specifies unit prices ranging from $2,133 down to $1,708 as production increases.

48. The Bofors gun (40 mm.) prices show equally astonishing decreases. The original contract dated January 7, 1942 specified a unit price of $4,288 (without mounts); the later contract with this manufacturer dated November 11, 1943 brought the price down to $2,510.

49. Prices of 20 mm. and 40 mm. projectiles have come down to about 50% of the original prices. These items are items as to which the changes in specifications have not presented the problem present with respect to many naval munitions. Quantities produced under Navy contracts have multiplied many times over during the past three years, and the price reductions may be attributed in large part to increases in volume. Production of the 20 mm. shells was begun in June, 1941 under eight contracts specifying unit prices which varied between 21.5¢ and 25.23¢ per shell; the most recent contracts in January and May of 1944 specify prices from 11.2¢ to 14.46¢ per shell. Similarly, pro- [fol. 191] duction of 40 mm. projectiles began in June and July, 1941 under eight contracts with prices ranging from 64¢ to 84¢ per unit; the latest contracts, executed in August and November, 1943 and September, 1944, provide payment of between 43¢ and 50¢ per shell.

50. Prices of other ordnance items have indicated how difficult it is to arrive at a price under the original contracts. One model of gunsight has dropped from $2,638.29 to $1,571.19. A case for depth charges which originally cost the Government $15.07 was later reduced to $10.31. Three-inch gun-barrel forgings were priced at $1,580 under the original contract of May 5, 1941; under the contract dated November 21, 1942, the price had gone down to $1,000.

iii. Bureau of Supplies and Accounts

51. This Bureau purchases all of the standard supplies, hardware, clothing, subsistence items and the like. The Bureau both prepares the specifications and writes the contracts for most standard supply items—hand tools, repair materials, furniture, stock items and the like. In 1941 and 1942 the Bureau of Supplies and Accounts also wrote a great many contracts for the other Bureaus, which drew up the specifications for the items to be procured, negotiated the price, and then sent a "requisition" covering the procurement to the Bureau of Supplies and Accounts to be written up in contract form.

52. Total *expenditures* of the Bureau (for items as to which it both prepared the specifications and wrote the contracts) increased from $563,000,000 in fiscal 1941 to $1,409,000,000 in fiscal 1942 and to $6,127,000,000 in fiscal 1944. These figures include expenditure of very substantial amounts for pay, subsistence and transportation of naval personnel. A very large proportion in dollar amount of [fol. 192] the Bureau's total procurement consists of petroleum products.

53. The prices under Navy contracts of most of the subsistence items and clothing items are so closely related to material costs that volume procurement does not have any appreciable effect upon the prices. I do not therefore present any examples of purchases of either subsistence or clothing items.

54. I shall cite several examples of reductions in the prices of some standard stock items largely as a result of purchasing in large quantities. Thus, twist drills are purchased under contracts for hundreds of thousands of dollars; the unit prices for these drills in different sizes and specifications vary from 8 or 10¢ to several dollars. Prices under a 1944 contract with one manufacturer for assorted lots of drills were 22½% less than prices under a 1942 contract with the same manufacturer. Another item of hand tools—hand taps—are purchased in a very wide variety of sizes and prices. Prices under a 1944 contract for hand taps show a decrease of 20% under the prices specified in a 1942 contract with the same manufacturer.

55. Comparison of prices for sisal rope of a certain specification under two contracts with the same manufacturer shows the following unit prices:

Size of rope	Price per pound	
	1942 contract	1944 contract
¾"	$0.195	$0.1835
1¼"	.19	.1763
1½"	.1825	.1619
4½"	.175	.1547
8"	.175	[illegible]7

The differences per pound are in cents and fractio[illegible] cents; but as the contracts involve several hundre[illegible] [fol. 193] thousands of pounds of rope, these differe[illegible] become quite large in total.

56. The difference is even more substantial in the case of steel cable. One of the early contracts, made in 1941, specified a price for certain ⅛" steel tow cable of $0.051 per foot; the contract for the same type of cable with the same manufacturer in 1944 provided a price of $0.037 per foot—a decrease of $0.014 per foot, or 28%. The later contract required delivery of 30,000,000 feet of cable, so that the total decrease from the original price amounted to $580,000.

57. Paint brushes under two contracts about 10 months apart (both executed in 1944) with the same manufacturer decreased from $2.95 to $2.61 for one size, from $2.67 to $2.34 for another; again, the difference is substantial under a contract for 105,578 brushes.

58. Perhaps a comparison of prices of nuts and bolts under a 1943 contract and a 1944 contract will bring home as cogently as any other comparison the difficulty of close pricing on small standard items. Under the earlier contract, the price for one ½" by 5" bolt and nut was $2.86 per hundred, while the price under the later contract was $2.12 per hundred; the prices for a ¾" by 6" bolt and nut were $7.51 per hundred as compared with $5.30 per hundred. Even more striking is the difference between the prices for a 1" by 5" bolt and nut—$14.90 per hundred under the first contract, and $10.10 under the second.

iv. Bureau of Aeronautics

59. All contracts for aircraft and aircraft components during 1941 and 1942 were drafted and executed by the Bureau of Supplies and Accounts, although prices and terms under these contracts were negotiated by the Bureau of Aeronautics. *Expenditure* of appropriations for which [fol. 194] the Bureau of Aeronautics was responsible increased from $194,000,000 in fiscal 1941 to $1,052,000,000 in the next fiscal year, and $4,696,000,000 in fiscal 1944. Total aircraft accepted (reflecting earlier contracts made) increased 122% from the first half of 1941 to the second half of 1941; acceptances in the first half of 1942 were 210% of acceptances in the preceding six months; and the second half of 1942 saw acceptances more than 200% of those for the first half of that year.

60. The contracts for airframes during this period were, with one exception, all cost-plus-a-fixed-fee contracts. They were invariably long-term contracts, in general extending over 18 months or more. The airframe manufacturers required cost-plus-a-fixed-fee contracts at this time, for their margin of capital in relation to total business was so small that they could not afford to incur any risks. For example, the Grumman Company had a capital of $5,000,000, yet its contracts with the Navy approximated half a billion dollars.

61. In the contracts for both airframes and engines, innumerable changes in specifications are made during the life of the contract.

62. One cost-plus-a-fixed-fee contract for torpedo bomber frames was let on March 23, 1942, at an estimated unit cost (plus fee) per plane of $101,863. This same contract was later converted into a fixed-price contract providing for incentive payments as reductions were made below specified costs, and as of September 30, 1944, the unit redetermined price was $58,050. A cost-plus-a-fixed-fee contract for scout bomber frames was made on February 2, 1942, at an estimated unit cost (plus fee) of $34,019 per plane; the present contract for the same frames is on the basis of $30,160 estimated unit cost. Finally, a contract made May 23, 1942, [fol. 195] on a cost-plus-a-fixed-fee basis provides an estimated unit cost of $63,985 for fighter frames; the most recent contract for these frames (fixed-price adjusted contract) calls for a unit price of $39,000.

63. Similar decreases are evident in the procurement of engines and propellers. Prices under 1941 and 1942 contracts for three different types of engines and two types of propellers, and prices under more recent contracts for the same articles may be compared as follows:

	Old Contract			Latest Contract		
	Date	No.	Unit Price	Date	No.	Unit Price
1st Type Engine	9/10/41	204	$14,500	12/29/43	439	$11,200
2nd Type Engine	7/29/41	2,293	13,151	12/29/43	400	11,051
3rd Type Engine	7/14/41	80	6,522	12/29/43	1,400	5,848
1st Type Propeller	4/ 4/42	259	1,081	12/23/43	583	878
2nd Type Propeller	3/30/42	248	2,266	12/29/43	3,375	1,880

64. The procurement of aircraft components likewise shows striking reductions in contract prices as the items are produced in greater quantities and as mechanical problems are surmounted. The following table shows the reductions in prices which have been effected for some items:

	Old Contract		Latest Contract	
	Date	Unit Price	Date	Unit Price
Motor Alternator	4/27/42	$280.00	5/15/44	$173.00
Starter—1st type	3/ 1/42	370.00	3/ 4/43	333.00
Starter—2nd type	2/ 2/42	355.00	12/ 2/43	290.00
Generator	9/11/41	343.00	7/11/44	229.00
Navigational Watch	5/28/41	30.25	3/23/44	28.45
Oil Pressure Gauge	10/16/41	2.35	11/10/43	1.95
Compass	8/22/40	43.50	4/13/44	35.72

v. Bureau of Yards and Docks

65. The expenditures of the Bureau of Yards and Docks increased from $412,000,000 in the fiscal 1941 to $1,076,000,- [fol. 196] 000 in the fiscal year 1942, and $2,265,000,000 in fiscal 1943. The Bureau's work reached its peak in the second half of 1942, when some $1,768,625,000 of work was reported completed on projects under the supervision of the Bureau of Yards and Docks. The great bulk of this work was done under contracts which had been made prior to passage of the renegotiation statute—indeed, many of them were made in 1939, 1940 and 1941, when some of the large contracts for base projects and advance bases had been let. The Bureau of Yards and Docks supervises construction of industrial facilities under the facilities contracts made by the other Bureaus.

66. The peak in the making of construction contracts and the peak of construction thereunder was reached in 1942.

Commitments for all types of facilities (industrial and non-industrial) for the first half of 1942 totaled $2,742,100,000, for the second half of 1942, $1,420,400,000; expenditures for work completed in these two six-months' periods were $1,275,000,000 and $2,190,000,000 respectively. The bulk of facilities contracts executed in the last six months of 1941 and the first four months of 1942 extended beyond the date of passage of the renegotiation statute on April 28, 1942.

67. It has been estimated that roughly 80% in dollar volume of construction contracts and extensions thereof made by the Bureau of Yards and Docks in fiscal 1942 required over 8 months to perform. Most of the very large construction contracts for construction of new bases extend over more than 12 months. It is of course impossible to compare costs or prices of different construction jobs, although prices of construction materials may be compared.

68. As to items procured by the Bureau of Yards and Docks, I shall cite as examples two items—pontoons and [fol. 197] floating dry docks. The pontoon program was started near the end of 1941 with an order for a few thousand pontoons; the number contracted for multiplied over six times in 1942, and increased in 1943 far beyond what anyone had anticipated. The Bureau procures two major types of pontoons, one of which is procured in numbers about 9 times as large as the other type. Prices have come down as follows:

	1st type	2nd type (procured in the larger quantities)
1941 (includes development costs)	$400	$660
1942	335	370
Late 1942	....	250
1944	270	200

Construction of floating dry docks began in 1941. These were an entirely new item, and extensive changes in specifications and design were made during the life of the early contracts. All of these contracts extended beyond April 28, 1942.

II. Action by the Navy Department with Respect to Excessive Profits

69. The Navy Department in 1941 and the early part of 1942 had only begun to build up machinery for the purpose

of ascertaining and recapturing excessive profits under its contracts. I have pointed out the enormous increase in the number of contracts and in the volume of Navy procurement during this period, and the impossibility of acquiring experienced personnel forthwith to negotiate the best possible prices for the Government. During the period in ques-
[fol. 198] tion (the latter part of 1941 and the first four months of 1942), the Navy Department discovered that some of its contractors were earning very large profits. We endeavored to correct the situations which came to our attention. It proved impossible then to achieve close initial pricing under most Navy contracts. After our experience of the last several years I am convinced that it will always be impossible in wartime to arrive at close prices for munitions, when the Government is uncertain as to the types or quantities of munitions which are needed (and the exigencies of war are such that we are almost never certain as to types and quantities).

a. 1941 Investigations

70. In the first half of 1941, both the House Naval Affairs Investigating Committee and the Truman Committee sent out questionnaires relative to profits to manufacturers and shipbuilders holding Navy contracts. The Truman Committee in June 1941, conducted hearings upon costs and profits under ship contracts and contracts for ship repair and alteration. These investigations brought out the fact that very large profits were being enjoyed by some contractors; the Truman Committee was particularly concerned with profits under ship repair and alteration contracts. Before these Committees had published any reports, however, the Navy Department made efforts to correct some of the contract prices, particularly under the ship-repair contracts. The first step was to make sure that the Bureau of Internal Revenue would treat a voluntary refund by a contractor as a reduction in his contract price and in his taxable income; in response to inquiries by the Navy Department, the Treasury Department in September 1941 indicated that for tax purposes it would so regard such a refund, provided the original contract was modified in writing to indicate the
[fol. 199] reduced price. Thereafter the Treasury further indicated that a refund made after completion of perform-

ance of the contract would likewise be regarded for tax purposes as a reduction of gross income.

71. Mr. Forfestal (then Under Secretary) and Rear Admiral Samuel M. Robinson (then Chief of the Bureau of Ships) in September 1941 requested the Compensation Board to investigate the cost records of contractors who were to complete ships under Navy contracts in 1941 and the first six months of 1942, and to determine what the probable profits in the construction of those ships would be. The Compensation Board was an administrative agency which had been set up by the Secretary of the Navy in the first World War to review costs under cost-plus contracts, and to advise the Secretary generally on amounts claimed by contractors under Navy contracts. Its functions in reviewing costs under contracts had been taken over largely in late 1941 by the Cost Inspection Service of the Bureau of Supplies and Accounts (the Cost Inspection Service was given complete responsibility to inspect costs under cost-plus-a-fixed-fee contracts, except those made by the Bureau of Yards and Docks, by a directive of the Secretary dated February 9, 1942). The Compensation Board planned to have its accounting branch, the Cost Inspection Board, go over the cost records of contractors under outstanding vessel contracts and attempt to estimate what the profits would be under such contracts. It was anticipated that in cases where the profits appeared to be excessive, the Bureau of Ships, acting in conjunction with the Compensation Board, would endeavor to persuade the contractors voluntarily to reduce prices. The Bureau of Ships had estimated that by limiting the investigation to contracts for vessels to be de- [fol. 200] livered prior to July 1, 1942, performance would be close enough to completion so that a fairly accurate estimate of anticipated profits could be made. Both the Compensation Board and contracting representatives of the Bureau of Ships felt that it would be wise to persuade contractors in advance to modify their contracts to allow readjustment in prices to eliminate excessive profits, if possible—a forerunner of the renegotiation clause.

72. The Compensation Board was unable to carry this project to completion. It did begin investigation of costs under the ship contracts, but the outbreak of war and the transfer of the bulk of its cost inspection activities to the

Bureau of Supplies and Accounts cut short the study of excessive profits of naval shipbuilders. The Bureau of Ships, aided by the Cost Inspection Division of the Bureau of Supplies and Accounts, late in 1941 began to carry forward certain of the work projected by the Compensation Board, in that it commenced negotiations with a number of shipyards under the ship repair and alteration contracts for revision of the contract billing rates.

73. At this same time, the House Naval Affairs Committee, acting as a Special Committee to investigate the national defense program, pursuant to House Resolution 162, approved April 2, 1941, was undertaking its study of excessive profits under Navy contracts. The Naval Affairs Committee had in April, May and June, 1941, obtained a list of all contractors with the Navy Department, and it sent out to these contractors a general questionnaire, which required the submission of extensive and explicit information on costs of performance of Navy contracts and profits thereunder. As responses were received from the contractors, supplemental questionnaires drawn to elicit informa- [fol. 201] tion as to a particular industry, were issued to contractors in different industries. The Committee stated that it had in the second and third quarters of 1941 sent questionnaires to 6,899 contractors holding 16,463 contracts. The questionnaires, which required a considerable amount of effort to fill out, aroused a good deal of protest, and also increased interest in excessive profits on the part of both the contractors and the Navy Department. (These questionnaires and the responses thereto are summarized in the Committee's report issued January 22, 1942, H. Rept. No. 1634, 77th Cong., 2d Sess.)

74. By October of 1941 Representative Vinson, Chairman of the House Naval Affairs Committee, felt that the Committee had acquired sufficient data on profits of Navy contractors to indicate the need for corrective legislation. While he indicated to the Navy Department that the questionnaires returned to the Committee showed that most of its contractors were realizing only a fair profit, he stated further that profits under certain contracts represented an "unconscionable percentage" of the contract price. Therefore, on October 7, 1941, he introduced H. R. 5787 (87 Cong. Rec. 7713) to provide for the recapture of all profits under

Government contracts in excess of 7% of the cost of performance thereof. At about this same time, another bill (H. R. 5739) was introduced imposing a flat percentage limitation of profits under war contracts—in this bill 8% of the contract cost. The Navy Department was opposed at this time and later to the revival of any percentage limitation of profits, such as that contained in the Vinson-Trammell Act. It had had the experience under the Vinson-Trammell Act with such type of profit limitation, and the officials responsible for procurement in the Department were confident that any reenactment of such a limitation [fol. 202] would impede the procurement programs.

75. Some consideration was given within the Department in the last several months of 1941 to the best method of limiting profits by administrative action. The only concrete results of this consideration were the readjustments effected by the Bureau of Ships in payments under the ship repair and alteration contracts. These contracts were in effect requirement contracts—i. e., contractor agreed to perform, for compensation based upon reimbursement of cost of materials and a fixed price per man-hour of work, all orders for ship repair or alteration work which might be placed with him by the Navy Department. Around the 1st of December 1941, the Bureau of Ships began to seek voluntary reductions in rates from the shipyards. Between December 1, 1941, and April 1, 1942, the Bureau in effect renegotiated 27 ship repair and alteration contracts, representing a very substantial portion of the outstanding number of such contracts. At hearings before the Senate Naval Affairs Committee on profit limitations late in January and early inn February of 1942, Captain Claud A. Jones (Assistant Chief of the Bureau of Ships) indicated that the Navy had recovered about $2,000,000 in profits by renegotiation of the ship repair and alteration contracts.[2] This figure does not, of course, indicate the savings which would accrue in the future by reason of the renegotiation of such contracts.

76. The work of renegotiating the prices under these contracts was spurred by publication on January 15, 1942, of

[2] Hearings before the Senate Naval Affairs Committee on H. R. 6355, S. 2027, 77th Cong., 2nd Sess., Page 7.

the Truman Committee's report, which covered among other things profits under Navy contracts for shipbuilding and ship repair and alteration. On January 22, 1942, the [fol. 203] House Naval Affairs Investigating Committee issued its first report on the defense program, which dealt extensively (409 pages including appendices) with the matter of profits under Navy contracts.[3] While the Committee noted that average profits under the contracts let by the several Navy Bureaus were not too much out of line, it did indicate some examples of extremely high profits. These profits were unduly high despite the excess profits tax. The whole report dealt with profits in terms of percentages of the contract price. It pointed out that the percentage of profits on sales was greater under uncompleted contracts than under completed contracts, and "that as the defense program progresses, the profits to the contractors are increasing and will tend to increase unless steps are taken to halt the trend." Much emphasis was placed upon this report by the Navy officers responsible for procurement. It also received very wide publicity at the time; the newspapers were full of editorials about the prevention of war profiteering, and the procurement officials of the Navy Department spent a considerable amount of time over the next several months in seeking to devise some more effective means of administratively limiting profits under Navy contracts.

b. Study and Suggested Solutions within the Navy Department, February-April, 1942

77. From the end of January, 1942 on, the efforts of Navy procurement officials to find some solution to the problem of policing of costs and profits were redoubled. While no formal organization had been set up to deal with the matter, several groups were devoting most of their time to an investigation of ways and means for limiting profits. [fol. 204] The procurement personnel of the several Bureaus worked closely with the investigating personnel of the House Naval Affairs Committee, and were instrumental in suggesting to the committee most of the contractors whose profits were so large as to merit further investigation. The Department was during this same period at-

[3] House Report 1634, 77th Cong., 2nd Sess.

tempting to work out a sound organization to handle the entire procurement problem, let alone the matter of war profits. It was on January 30, 1942, that the efforts towards coordinating the divergent procurement activities of the several Bureaus culminated in the establishment of the Office of Procurement and Material in the Secretary's Office.

78. At the Under Secretary's request I devoted a large part of my efforts during the months of February, March, and April, 1942 to working out some means of curbing profits under our contracts which would not interfere with the more important objective of obtaining the munitions and supplies required by the Fleet. I spent a great deal of time during this period in discussing this problem with representatives of the Procurement Branch in the newly formed Office of Procurement and Material, the contracting branches of the several Bureaus, and the accounting personnel in the Bureau of Supplies and Accounts. During these three months the Under Secretary also brought into the Department several men with wide business experience who looked into the entire matter of profits under Navy contracts and who subsequently became members of the Price Adjustment Board (established several weeks prior to passage of the renegotiation statute). The problem of the right way (if there were any "right" way) of handling the problem, was, however, still very much in the formative stage—it was not then possible to set up any more definite organi-[fol. 205] zation to handle the matter of closer pricing and excessive profits. In February we held several discussions with representatives of the Army procurement services as to the best cure for excessive profits, and considered a proposal to include in war contracts clauses under which the contractor agreed to consider adjustment or renegotiation of the contract prices.

79. Early in March, I submitted to the Under Secretary, on behalf of the Navy group which had been studying the problem, some tentative conclusions. It was the consensus, first, that the Navy Department must continue to rely upon the "profit motive" as an important factor in inducing war production, but that nonetheless, excessive profits had a bad effect on public and military morale and also tended to encourage demands for wages increases and decreases in labor efficiency. With respect to the proposal to limit prof-

its to a flat percentage of the cost of performance of contracts, it appeared probable that industry would insist upon a floor under losses if it were to be subjected to a ceiling upon profits. This floor under losses could be accomplished only under a cost-plus type of contract, which was expensive to supervise and audit, tended to reduce efficiency, and often permitted very high profits on a yearly basis; and the 7% limitation on the fee allowed under such contracts, while low for some businesses, permitted very high returns for other businesses. The amount of manpower and effort required to audit such contracts or to administer the flat percentage type of limitation under fixed-price contracts would be enormous and probably could not be drafted if this limitation were put into effect. With respect to excess profits, it was our position that corporations must be permitted to retain some portion of their profits in order to [fol. 206] preserve the influence of the profit motive and in such event the amount of profits before taxes in view of the extraordinary ballooning in some industries was often so large as to leave excessive profits even after taxes. There was no easy answer to the problem of effective profit control. It was my view at that time that we should attempt to do as much as we could by starting at the very beginning—in the negotiation of contract prices. The Government should be represented in such negotiations by experienced and skillful negotiators who would endeavor to see that the maximum of effort was produced at the right price. We realized then that in the light of all of the imponderables, even skilled negotiators would be unable to achieve close pricing in many instances. It was recommended to the Under Secretary that experienced price negotiators be placed in each of the contracting Bureaus. This suggestion was discussed at considerable length in various meetings and bore fruit several months later in the establishment of a Price Negotiation Section in the Bureau of Supplies and Accounts, which was ultimately extended to all of the Bureaus of the Navy Department.

80. At about this same time (early March, 1942) as a result of our several discussions within the Department, consideration was given to a proposed directive to be signed by the Secretary with respect to the allowance of reasonable profits on fixed-price negotiated contracts. It was pro-

posed that prices be fixed to allow a profit of 6% generally but up to 10%, of the estimated cost of the contract, to be determined on the basis of cost data and financial statements submitted by the contractor—in short, an embodiment in each contract of the Vinson-Trammell type of limitation, applied in advance. The directive was discussed in considerable detail on March 13, 1942, by representatives [fol. 207] of the several Bureaus, the Special Assistant to the Under Secretary, Vice Admiral Robinson (Chief of the Office of Procurement and Material), and myself. We were agreed at this meeting that the proposed directive would tie the Navy Department completely to the percentage limitation of profits concept, with all of its inherent deficiencies. We therefore decided that we would not recommend that any such directive be signed by the Secretary at this time, and that we would attempt further to devise some effective means of control of profits within the Department. One feature of the proposal was revived several weeks later —namely, the requirement that the contractor submit statements as to the estimated cost of performance of his contract and other financial data in connection with the performance of Government contracts. Some time thereafter this did become the standard practice.

81. At this same time the War and Navy Departments and the War Production Board had been working upon the establishment in each of the three agencies of cost analysis sections, which would be able to point out profit danger spots and suggest administrative remedies therefor. On March 17, 1942, representatives of the Office of Procurement and Material who had participated in these discussions circulated a proposed outline of procedure for the establishment and workings of such sections. This suggestion provided for the close coordination of the proposed cost analysis sections in the three agencies, and provided further that the War Production Board would attempt to supply a check on the selection of contracts for cost analysis so that the program would not put an unmanageable burden upon the accounting offices of the three Departments. After further discussion of ways and means, the cost analysis sections were set up about three weeks later. [fol. 208] The War Production Board was to function primarily in analyzing the cost reports prepared by the War and Navy Departments.

82. In the latter part of March Messrs. Kenneth H. Rockey and Sylvan Coleman came into the Department at the Under Secretary's request to study the whole matter of excessive profits and closer pricing. Messrs. Rockey and Coleman went over the rather substantial data which we had by this time accumulated and spent considerable time with the contracting officers of the several Bureaus in reviewing contracting procedures and the methods then available for determining whether or not excessive profits were being earned. Both of them took a very active part in the discussions which were then occupying most of the time of the group studying the matter of excessive profits. When the Navy Price Adjustment Board was established about April 20, 1942, Mr. Rockey was made its Chairman and Mr. Coleman was made a member of the Board.

83. In the course of our study, some of the cases of excessive profits enjoyed by subcontractors were brought to our attention. We learned of several instances in which the prime contractor with the Navy Department had given subcontracts to one of its subsidiary companies, and had included in its cost figures under the prime contract allowances for profits of subsidiary contractors. We sought to require representations by the prime contractor which would prevent any repetition of such practice. Of course, we recognized that any scheme of percentage-profit limitation tended to favor high profits for subcontractors; the prime contractor would not be interested in keeping subcontract costs or prices low, since the higher such costs or prices were, the higher the base on which his percentage of profits would be figured. Also, there were some instances [fol. 209] where work was subcontracted directly and the fee of the subcontractor was added to the fee of the prime contractor to make for double profits on the same work.

84. During the last week of March, 1942, the House Naval Affairs Investigating Committee held hearings on excessive profits being earned by several large Army and Navy contractors. These hearings were extensively reported in the newspapers, and the large profits earned by the Continental Motors Company and of Jack and Heintz received particular attention. The Naval Affairs Committee had received most of its data on these contractors from a joint audit which had theretofore been undertaken by the Army and Navy. The hearings had the helpful result of producing a

number of meetings between Army and Navy representatives for joint consideration of the best means of limiting excessive profits. At such a meeting on March 25, 1942, it was concluded that each Department should have available an organization to which would be reported all cases wherein it was suspected that contractors were earning excessive profits. The meeting envisioned that these organizations would function about as follows:

a. All procurement officers would be advised of the establishment of the two organizations, and requested to refer to them for further investigation cases of excessive profits.

b. A conference would be called between the contractor and representatives of all Government agencies holding contracts with such contractor. At this conference, the profits would be considered with a view to obtaining for the Government a return of profits deemed excessive or a reduction of the contract price by the amount of such profits, whichever might be appropriate.

[fol. 210] c. The meeting contemplated that in the cases of recalcitrant contractors, resort might be had to compulsory orders under Section 9 of the Selective Training and Service Act; and further that in appropriate cases full publicity would be given to the excessive profits and the action taken.

The March 25th meeting further determined that immediate action along the lines indicated would be taken jointly by the services in the case of Continental Motors. In general, the War and Navy Departments were agreed that each case should be dealt with on an individual basis, although at the outset it might be advisable to approach a group of contractors (perhaps those mentioned at the hearings of the House Naval Affairs Investigating Committee) and to deal with them in a body. It was agreed that the proposed action would be reported to the Congress to indicate the bona fide efforts being made by the War and Navy Departments to achieve answers to the problems of excessive profits. This meeting really represented the birth of the Price Adjustment Boards.

85. The War and Navy Departments thereafter discussed with the War Production Board this proposal to set up bodies to investigate war profits. Growing directly out of these discussions was the proposal that a Presidential

Board be appointed to serve throughout the war for the purposes of studying the experience of other nations as to profit limitation, formulating a comprehensive program for the prevention of excessive profits, suggesting legislation and procurement policies as deemed appropriate, and dealing with special difficult cases. The proposal contemplated that Congress, the Army and Navy and other war procuring agencies would be able to look to such Board for guidance and advice.

[fol. 211] 86. By the time this matter was brought up for consideration, however, H. R. 6790, the revival of the Vinson-Trammel percentage limitation, had been introduced (March 16, 1942); and Representative Case had introduced his amendment to H. R. 6868, providing for the renegotiation of contract prices to eliminate all profits above 6% (March 28, 1942). These proposals were discussed with representatives of the Army and the War Production Board, and representatives of the Navy presented to the House Naval Affairs Committee and to the Senate Finance Committee our views with respect to them, and commented upon the several revisions of the renegotiation proposal which were submitted to us.

87. The passage of the Second War Powers Act, 1942, on March 27, 1942, afforded an additional weapon to the Navy Department and the other war procuring agencies in the investigation and determination of excessive profits. Title XIII of this Act allowed the agencies, when so authorized by the President, to inspect and audit the books and records of their contractors and to require such financial data as they desired. The President, by Executive Order 9127 dated April 10, 1942, delegated this authority of investigation and audit to the procuring agencies, subject to certain conditions. The Departments were enabled to go into the plant of any contractor and require the submission to them of all information as to profits.

88. The Cost Analysis Section and the Price Adjustment Board were formally organized in the Office of Procurement and Material about April 20, 1942, and were specifically called to the attention of all procuring officers of the Department by a memorandum circulated on April 24, 1942.

[fol. 212] 89. The informal group which had preceded the formal establishment of these two organizations, the Bu-

reau of Ships and the Cost Inspection Division of the Bureau of Supplies and Accounts, had meanwhile in the first four months of 1942 continued to readjust and renegotiate contract prices. The accomplishments of the Navy Department in reducing prices up through June of 1942 were summarized in the report of the House Naval Affairs Investigating Committee of July 22, 1943.[4] The Committee had obtained the names of specific contractors investigated and a great deal of the data on the excessive profits which they were enjoying, from the Departments. The Committee included in its report a summary of the "actual monetary savings to the Navy Department" as a result of renegotiation of contracts. It indicated that the Navy had effected such savings to the extent of some $88,000,000. While the Committee did not so indicate, the great bulk of this amount constituted reductions in contract price rather than returns of cash received by the contractors. Furthermore, as the Committee did point out, the renegotiations effected at that time would later show substantial results in lowering prices on new contracts for the munitions for which the original contracts had shown excessive profits. With respect to the ship repair and alteration contracts, the Committee remarked that refunds under these contracts amounted to $7,000,000 (which is to be compared with the $2,000,000 which had been recovered by the end of January, according to Captain Jones' testimony). As the volume of ship repair and alteration work had increased under these contracts, profits had expanded rapidly under rates which had been fixed in the absence of any adequate experience in this type of work. Under contracts of this type, the Bu- [fol. 213] reau of Ships had been fairly successful in renegotiating profits to allow no more than 10% of costs (as compared to an average profit on such contracts prior to their readjustment of 30% of their cost of performance).

90. I am unable to present any concrete figures from the Navy Department as to the total cash refunds of profits by Navy contractors prior to April 28, 1942. Apparently all of the cash refunds were collected by means of deductions from vouchers; no record had been kept of any such deductions, and it would be an interminable undertaking to examine the vouchers under each contract in the anticipation

[4] H. Rept. No. 2371, 77th Cong., 2d Sess., pp. 26-32.

that they might reveal voluntary reductions in price. In addition, any recapitulation of the cash refunds would not show the whole picture, for most of the savings to the Government in the elimination of excessive profits were effected by means of price reductions.

c. Consideration of the Percentage Profit Limitation Proposals

91. Meanwhile, the Congress had been considering several proposals to impose a percentage limitation of profits upon Government contracts, and there appeared at the time to be a very strong chance that such a method of limitation would be enacted by the Congress. These proposals, to which the Navy procurement officers were unalterably opposed, naturally spurred the efforts within the Department to arrive at a solution to the profit limitation problem. On March 16, 1942, there had been introduced in the House H. R. 6790, which proposed among other things to limit profits on all Navy contracts to 6% of the cost of performance thereof. The bill was referred to the House Naval Affairs Committee, which held a number of hearings upon it in late March and April 1942.

[fol. 214] 92. Both Mr. Forrestal and Col. Knox testified with respect to H. R. 6790. Mr. Forrestal called attention to the vast amount of auditing work which would be necessary to enforce any such limitation, and discussed our experiences under the Vinson-Trammell Act. The Secretary, who testified on April 16, 1942, brought out the immense variety of factors which affected profits under a particular contract and the impossibility of any single cure for excessive profits applicable to all contracts. He pointed out one very important consideration which the Congress had not thus far emphasized—the importance of reducing costs to the Government as well as profits. As he suggested, high costs and reduced profits often went hand in hand, and high costs could be much more expensive to the Government than high profits.

93. The Navy had had some experience in the difficulties of obtaining good accountants and auditors to handle the growing dollar volume of cost-plus-a-fixed-fee contracts. In early 1942, there were in the Cost Inspection Service of the Bureau of Supplies and Accounts, which audited costs un-

der these contracts, some 2700 accountants (most of whom were stationed outside Washington); in addition there were a substantial number of accountants in the Bureau of Yards and Docks, which audited its own construction contracts. H. R. 6790 proposed to have costs under Government contracts determined by reference to Treasury Decision 5000 (the regulation under the Vinson-Trammell Act), which was then used as a guide for auditing costs under the cost-plus-a-fixed-fee contracts. The determination of costs was a burdensome and time-consuming job, and there were substantial differences of opinion as to what items were properly allowable costs. The complete post-[fol. 215] audit of expenditures under the cost-plus contracts by the General Accounting Office, after audit by the services, further complicated the difficulties of administering the cost-plus-a-fixed-fee contracts. It seemed clear that there would not be enough accountants in the nation to scrutinize costs under every Government contract, as contemplated by H. R. 6790, in the same way that costs were scrutinized under the cost-plus contracts.

94. H. R. 6790 was tabled in committee, for the renegotiation bill had been brought to the fore by the Congress. Section 403 of H. R. 6868, as reported out by the Senate Appropriations Committee, contained in subsection (f) a graduated range of percentage limitations to be applied to Government contracts of different size. Representatives of the Navy Department joined the representatives of the other war procuring agencies in discussing this subsection with the Senate Committee, which ultimately agreed that the percentage limitation feature should be deleted.

d. Maximum Price Controls

95. The matter of price controls upon munitions was considered by the Under Secretaries of the Navy and War and the Price Administrator in late 1941. They decided at such time that it would not be necessary to set up any formal machinery for handling differences of opinion between the armed forces and the Price Administrator with respect to prices, but that each problem would be handled as it arose. The situation was changed substantially by the approval on January 30, 1942 of the Emergency Price Control Act of 1942. The armed services had in the consideration of the bill which became the Price Control Act recommended that

munitions be expressly exempted thereunder, but their sug-
[fol. 216] gestion was rejected. The possible imposition of maximum price ceilings on munitions pursuant to this Act was a rather unsettling factor in the whole discussion of possible methods for control of profits during the next several months. At the time of passage of the Act, the Price Administrator had not determined upon a policy as to the establishment of ceilings for the purpose of preventing war profiteering and of controlling prices under contractors for war materiel. On the day the renegotiation statute was approved—April 28, 1942—the Office of Price Administration issued its "Big Freeze" order, the General Maximum Price Regulation, and its Machinery and Parts Regulation (Maximum Price Regulation No. 136). The coverage of these regulations included a great many items of completed munitions and almost all components thereof, although certain specified munitions were to be exempted from the price ceilings established under the Regulations. Broadly speaking, the General Regulation fixed the price ceilings by reference to the prices in effect during March 1942, and required specific authority from the Office of Price Administration for the fixing of ceilings where there were no analogous March 1942 prices; and the Machinery and Parts Regulation fixed ceilings by reference to the prices in effect October 1, 1941, and also required specific authority from the Office of Price Administration in cases where there were no analogous October 1, 1941, prices.

96. The issuance of these regulations precipitated an immediate and prolonged discussion between the armed services and the Office of Price Administration as to the desirability of fixing price ceilings for munitions and their components. As a stop-gap measure, the Price Administrator postponed application of the regulations to sales and
[fol. 217] deliveries under Army and Navy contracts until July 1, 1942. In the latter part of May 1942, the Under Secretary of the Navy established a liaison office in the Bureau of Supplies and Accounts, which was to integrate the price policies of the Navy Department and the Office of Price Administration insofar as possible.

97. It had been the position of the Army and Navy in all of their consideration of price control that it would be unwise and impracticable to apply price regulations to strictly military and naval equipment, and that attempts

to do so ran the risk of impeding procurement of such equipment. It was felt that the services responsible for war procurement must have final power over prices; such services were charged with full responsibility for procuring the articles with which to fight the war, and proper prices might well be an inextricable element in such procurement. In the latter part of July 1942 the Under Secretaries of War and of the Navy notified the Price Administrator that while they recognized the necessity of adopting all possible means to prevent inflation, they felt that it was necessary to exempt military and naval supplies from the application of price ceilings. The Under Secretaries pointed out the difficulties inherent in effectively applying ceilings to munitions—e g., the wide variety of conditions and uncertainties faced by contractors, the changes in specifications, inexperience of contractors, necessity of using all contractors and procuring all items regardless of cost. They further pointed out the probable impediment to production and procurement which the imposition of price ceilings would bring about, the undesirability of divided authority with respect to procurement, and the uncertainty and delay which would result from the application of the price regulations to Army and Navy contracts. Finally, they re- [fol. 218] quested that "all articles which are designed and produced exclusively for military uses, and all subassemblies and parts of such articles which are themselves designed and produced exclusively for such military articles" be exempted from price regulation by the Office of Price Administration, with the exception of articles subject to regulation prior to June 30, 1942; that in questionable cases exemption be granted upon certification by the Secretary of War or of the Navy that the exemption was necessary for the prosecution of the war. The Under Secretaries pointed to the authority to renegotiate contract prices under the recently enacted renegotiation statute as a means at their disposal of controlling excessive profits and preventing inflation.

98. After further consultation, the Price Administrator responded in September 1942 by indicating that he would not extend maximum price control in the area of strictly military goods, provided he received assurances that the Army and Navy would use their powers to control both prices and profits in the exempted areas. He further indi-

cated willingness to consider any requests for exemption of particular items at that time under formal price regulations. The Office of Price Administration agreed not to extend price control to sales of strictly military goods. It was understood that the exact line of demarcation between military and non-military goods would have to be more precisely drawn after conferences among the three agencies. The War and Navy Departments accepted the proposal as drawn by the Price Administrator, and agreed to furnish his Office with such information as it requested on the prices and procedures of the two Departments. Thereafter the armed services did establish divisions which furnished to [fol. 219] the Office of Price Administration all information on prices requested by such Office.

99. Prior to the passage of the renegotiation statute, the top Navy officials in charge of procurement had spent a very considerable amount of time in seeking to evolve some answer to the extraordinary difficult problem of limiting war profits while at the same time executing the vastly accelerated procurement programs.

100. There was virtual unanimity of opinion that the percentage limitation of profits was not a solution to the Navy problem—experience indicated that it was not effective and that it made contractors hesitant to take Government contracts. Indeed, it made many manufacturers want to become subcontractors rather than prime contractors. The limitation of adequate accounting personnel was an even more compelling practical reason for the rejection of this means of profit control. Similarly, we had neither the inclination nor the necessary personnel to extend the use of the cost-plus-a-fixed-fee contracts to fields wherein we were able to use fixed-price contracts. We knew from actual experience that exorbitant profits were being earned despite the recoveries under the excess-profits tax. The proposal to subject munitions to price ceilings had been seriously considered by the time of passage of the renegotiation statute, although the matter was not settled until the latter part of 1942.

101. The Navy Department was, then, in early 1942 in the position of opposing the known and theretofore attempted methods of limiting war profits, either because some of them were ineffective or because others would in the opinion of those responsible for procurement seriously interfere

with war production. We would quite frankly have preferred at this time to work out our own administrative solution to the problem of limiting profits under Navy [fol. 220] contracts, primarily through analysis of costs and closer pricing. The solution proposed by the Congress in the renegotiation statute, however, appeared to us to be a much better method than any alternative statutory method available. In retrospect, I believe that it is the better approach and that our earlier preference would not have solved the problem.

III. Navy Contract Forms and Clauses

102. The advent of the negotiated contract completely changed the form of the Navy contract and made necessary the use of much more intelligence and skill in the preparation of contracts.

103. Contracts awarded to the highest bidder after solicitation of competitive bids had all been based upon Forms 32 and 33 prescribed by the Procurement Division of the Treasury Department for all Government agencies. Such forms of contract, with their boilerplate provisions, were satisfactory only for simple deals, and proved quite inadequate for negotiated contracts. The first break away from these restrictive forms came in the preparation of construction contracts and contracts for the construction or installation of industrial facilities (in 1939 and 1940). In developing provisions for the facilities contracts—financing the contractor, purposes for which the facilities were to be used, rights of the parties upon the termination of the emergency period, and the like—it was obvious that the contract would have to be tailor-made to fit the particular arrangement. Furthermore, in the course of drafting these various provisions to fit the procurement transaction, the boilerplate provisions were scrutinized and were often improved or made more appropriate. The grant of authority to negotiate certain contracts for vessels and supplies (June 1940) further accelerated the process of critical [fol. 221] amination of the contract provisions and the drafting of intelligible new provisions to meet particular needs.

104. After enactment of the First War Powers Act, 1941, and the promulgation of Executive Order No. 9001, the

Secretary removed entirely the restrictions of Form 32 in the preparation of negotiated contracts. The Secretary's directive of December 28, 1941, established a new internal Navy procedure for clearing contracts negotiated under the War Powers Act; in addition, it delegated to contracting officers complete discretion with respect to the form of such contracts, except for certain specified provisions required by statute or executive order. Under this delegation of authority, contracting officers were granted complete discretion to make advance, partial, and other payments on account of the contract price,

> • • • without limitation as to amount and irrespective of any provisions of law as to security, liens (except as [to the lien in favor of the Government as permitted by the Act of August 22, 1911, 34 U. S. C. 582]) or otherwise, except that advance payments should be carefully scrutinized to determine whether such payments are necessary for the satisfactory performance of the contract in accordance with the terms thereof and as much security by means of controlled accounts or otherwise shall be provided for as may be expedient under the circumstances of each case.

The directive further specified:

> Such contracts [under the War Powers Act] may be made with or without competitive bidding as the respective contracting officers in their discretion may de- [fol. 222] termine. There shall be no limitations or restrictions as to form and substance of such contracts except [the contract clauses required by statute or executive order].
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> The contracting officers are authorized to select such procedures in making contracts as are deemed best fitted to the purchases involved and the needs of the Navy.

105. At this time all instructions relative to contracts were in the form of individual directives by the Under Secretary to the Bureau Chiefs, who transmitted such instructions to the officers under them responsible for preparing contracts. Since the great majority of Navy contracts were made by the Bureaus in Washington, these directives could

be rather informally issued and distributed. In general, they gave a wide degree of discretion to the Bureaus in the preparation of contract provisions. As we began to pay more close attention to prices and the elements which went into prices, it became necessary to issue more detailed instructions relative thereto; it was not until October 1943, however, that we were able to collect the contract directives in one place, arrange them, and issue them in a loose-leaf volume (the Navy Procurement Directives).

106. I shall summarize very briefly the more or less common Navy contract provisions prescribed in the first several months of 1942 for the determination or adjustment of prices or costs.

i. Changes

107. All Navy contracts included provisions for changes in the work covered thereby. The changes clause in all Bureau of Ships contracts was broader than that in other contracts made by the Navy.

[fol. 223] The Bureau of Ships clause provided:

> The Secretary of the Navy, at any time and without notice to the sureties, may make changes in this contract including the General Provisions, the plans or specifications of this contract, *within the general scope thereof*.

This type of clause had been in ships contracts since the 1880's. The broad language of the clause had, by construction, been somewhat limited in scope. The clause was eliminated about a year ago, and the ships contracts now contain provisions limiting changes to the work under the contract, as in other Navy contracts.

108. With respect to changes in price upon a change in specifications or in the work under the contract, the more or less standard clause for fixed-price contracts provided that if the changes caused an increase or decrease in the cost of performing the contract, "an equitable adjustment" would be made and the contract modified in writing accordingly; facilities and cost-plus-a-fixed-fee contracts provided that upon the making of changes "an equitable adjustment of the estimated cost and the fixed fee would be made and the contract modified accordingly." In the event of failure to agree upon a change in the fixed price or fixed

fee, the matter was to be decided by the contracting officer pursuant to the disputes clause of the contract. The cost-plus-a-fixed-fee contracts for vessels provided specifically that if the estimated costs were changed as a result of changes in specifications, the fixed fee, which was stated to be about 7% of the estimated cost, should be changed by 7% of the change in the estimated cost.

ii. Payments

109. The contracts provided specific procedures for submission of invoices covering costs under cost-plus and facil-[fol. 224] ities contracts, and for prices of goods delivered under fixed-price contracts. These provisions varied substantially among the different types of contracts.

110. Fixed-price contracts for vessels called for partial payments as construction of the vessel progressed. The provisions for advance payments under fixed-price contracts specified that a lien should be established in favor of the Government on the materials and property acquired by the contractor. In some instances controlled accounts were established, providing a check by the contracting officer upon the advance payments to the contractor; the advance payments clauses were at this time relatively simple as compared to clauses presently in use.

iii. Insurance and bonds

111. All contracts required the contractor to carry insurance on the property produced or acquired thereunder, and to carry workman's compensation and other third-party liability insurance with respect thereto. The Government generally undertook to make the contractor whole for losses sustained in excess of the amounts covered by insurance taken out at the direction of the contracting officer.

112. After passage of the War Powers Act, performance and other bonds were largely dispensed with, although they were still required for certain standard supply contracts made by the Bureau of Supplies and Accounts. In any event, the performance, payment and similar bonds had never been of much use to the Navy. It had invariably proved impossible to obtain bonds at any cost in the cases where they were most needed. Generally the cost of bonds was high and the amounts of coverage in the case of large

contracts were entirely inadequate to protect the Government.

[fol. 225] iv. Patents

113. Whenever patents were involved in the procurement, the standard clause of the Treasury Procurement contracts was used—the contractor agreed to hold the Government harmless against claims for infringement of patents in the performance of the contract. Some ships contracts contained the further requirement that the contractor not pay any sum for royalties or patent rights not included in the ordinary purchase price of parts embodied in the ships, unless and until duly so authorized by the contracting officer. No real progress was made in the matter of controlling royalties and other payments relative to patents under Navy contracts, and in drafting patent clauses which adequately protected the interests of the Government, until after the Procurement Legal Division was authorized to handle such matters in August, 1942.

v. Termination

114. Navy contracts (except Bureau of Ships contracts) at this time provided that in the event of cancellation for the convenience of the Government, the Navy would pay the contractor for all costs, including a proper allocation of overhead expense to the contract, incurred up to the time of termination, plus an allowance of 6% or 7% profit on all such costs except purchases of materials and unfinished goods, for which the contractor was reimbursed at cost. This provision differed from the clause then used by the Bureau of Ships and the Army, which calculated the profit on the estimated extent of completion of the contract—the contractor was paid a percentage of the total profit equal to the percentage of completion. The use of any clause was a vast improvement over the practice in the first World War, when contracts did not contain any termination clauses.

[fol. 226] 115. Navy contracts, other than ships contracts, also had included clauses authorizing termination for default, corresponding to the delays-damages clause of the old Treasury Form 32—if the Government terminated for default in delivery, it had the right to purchase the goods

elsewhere and surcharge the contractor for any additional costs incurred by reason thereof by the Government.

116. After the First War Powers Act, the Navy dropped almost entirely the liquidated-damages clause. At this time there were frequent delays due to changes in specifications, material and labor shortages and the like, and it was often if not usually difficult to hold the contractor responsible for delays in deliveries. In addition, contractors were extremely reluctant to take contracts containing such clauses. As the Navy was interested in getting the goods themselves, and not money damages, it determined to omit this clause generally.

vi. Guarantees

117. Most contracts in early 1942 contained a clause under which the contractor undertook to guarantee for a certain period the performance or durability of the articles covered by the contract in conformity with the specifications. This period varied from 3 months to a year or more. The contractor further undertook to correct or repair at his own expense any deficiencies or failures in the contract articles during such period. The ship contracts provided for trials, and adjustments and corrections by the contractor of the vessels during such trials. If the contract was a fixed-price contract, the contractor would often include large contingencies in his prices to cover possible expenses during the guarantee period. Since 1943 and 1944 the period of the guarantee has been shortened, and the clause [fol. 227] has been entirely eliminated in a few cases from Navy contracts.

vii. Escalator clauses in fixed-price contracts

118. Most fixed-price contracts for any substantial amount in late 1941 and early 1942 contained provisions for adjustment in price upon changes in material or labor costs. I should estimate that a majority in dollar amount of fixed-price contracts executed during this period contained escalator clauses. These clauses varied substantially in scope and in the index selected to measure increases in costs.

119. Some of the more primitive types of clauses had attempted to protect the contractor to the full extent of any cost changes. Almost all of the clauses in use at the

time the renegotiation statute was being debated, however, attempted to protect the contractor not against all variations in the cost of labor and materials, but only against such changes in those costs as might be attributed to general changes affecting the entire national economy and thus wholly beyond the contractor's control. The basis for calculating changes in costs under the escalator clauses were in most cases indices representing wage levels (either general or for a specific industry) and material costs, usually indices published by the Bureau of Labor Statistics.

120. The most important determination in any escalator clause was the selection of the base to which the percentage of change in a selected index is applied in order to calculate the permitted adjustment of the contract price. The base selected varied widely among the several contracts, and was often extremely complicated to compute—requiring in some cases substantial cost accounting. All of the escalator clauses are rather complicated to apply. The computations under most of them were made by the Cost In- [fol. 228] spection Service of the Bureau of Supplies and Accounts. We have subsequently discovered certain errors in the drafting and application of certain clauses, whereby increases were computed on costs including the price increases against which the escalator clause was designed to protect the contractor. We corrected such increases as they were called to our attention.

121. All escalator clauses are to some degree inflationary and are harmful in that respect. The device had many disadvantages—it was used only because the Navy could not persuade contractors to take contracts on any other basis. Because of the uncertainties as to labor and other costs and the impetus to inflation which any war provides, contractors refused to run the risk of being tied to a fixed-price under a long-range contract. Escalator clauses were to be used only in long-term contracts. Our need for munitions was so great, however, that we could not quarrel very much over inclusion of such provisions. It must not be assumed that because an escalator clause was included in a contract, the price fixed therein did not include any allowance for contingencies. As has been made quite evident later, the price did include substantial allowances for contingencies. Furthermore, as I have indicated, the escalator clause was not a complete answer to the contractor's in-

sistence upon protection. The clause purported to protect him only against certain direct labor and material price increases and did not protect him against other labor and material costs or other indirect costs which were subject to real fluctuation. The device was an imperfect one which it was necessary for us to adopt in order to speed procurement. Even with the elimination of the risks covered by the escalator clauses, contractors were able in some instances to make profits aggregating 50% or more of cost, as witness [fol. 229] the ships contracts which I earlier cited.

122. On January 30, 1942, the Emergency Price Control Act was approved. The adjusted increases in contract prices under the escalator clause had to stop at any ceilings established by the Price Administrator on articles purchased or produced under the contract. At that time it was not known just how the Act would affect price escalation; subsequently specific escalator clauses have been worked out for contracts covering certain materials subject to OPA ceilings.

IV. Necessity of the Renegotiation Statute

123. Had the renegotiation statute not been enacted, I am convinced that Navy procurement would have been affected in the following ways, among others:

a. greater use of cost-plus contracts;

b. enforced use of mandatory orders to obtain munitions with respect to which agreement on price could not be reached;

c. reluctance on the part of contractors to take prime contracts, including preference for subcontracts; and

d. excessive profits and waste.

These probable results are to a large degree all tied together. We should have found it more and more difficult, I believe, to allow the large contingencies demanded by contractors in fixed-prices, and should therefore have been driven to a much wider use of the cost-plus-a-fixed-fee contract and the mandatory order. I have earlier described the lack of incentive to reduce costs which is inherent in the form of the cost-plus-a-fixed-fee contract, and the large number of auditing personnel required to determine allowable costs under such contracts. Mandatory orders con-

stitute a somewhat ponderous means of procurement, and [fol. 230] leave the Government with the pricing problem still on its hands, plus possible court proceedings. There can be little doubt but that profits would generally have been larger in the absence of renegotiation. After a study of the complex problem of limiting profits in war to fair and reasonable amounts—the problem both as we faced it in the past and as we have faced it in this war—I know of no other type of profit limitation which can take into consideration the many diverse factors affecting the profits of different contractors and fairly adjust those profits, as adequately as does the renegotiation process. The growing Congressional and public criticism of exorbitant war profits in 1941 and 1942 would have resulted in an increasing reluctance on the part of manufacturers to take war contracts, and eventually in some form of profit limitation less palatable and less equitable than renegotiation. I am strongly of the opinion that, while the Government should consistently seek to improve its negotiating procedures in arriving at close prices, the problems of war procurement render impossible any completely satisfactory solution of the problem of initial pricing. Renegotiation, which affords a review of prices after the contractor has had the cost experience in the performance of his contracts, is to my mind an essential part of wartime procurement, today as well as in early 1942.

(S.) H. Struve Hensel.

Sworn and subscribed before me this 11th day of June, 1945.

(S.) Lucille Holland, Notary Public, D. C.

My Commission expires Sept. 1, 1946.

[fol. 231] IN UNITED STATES DISTRICT COURT

[Title omitted]

[File endorsement omitted]

AFFIDAVIT OF MAURICE HIRSCH—Filed June 11, 1945

Maurice Hirsch, Colonel, General Staff Corps, being first duly sworn, deposes and says:

I am the Chairman of the War Contracts Price Adjustment Board and of the War Department Price Adjustment Board.

The general responsibility for and supervision over the methods adopted for elimination of excessive profits in War Department cases has been delegated by the War Contracts Price Adjustment Board to the Secretary of War, and, by intermediate delegations, has been further delegated to the Chairman of the War Department Price Adjustment Board.

In each instance in the War Department in which there is a determination of excessive profits an investigation is made by or on behalf of the Chairman of the War Department Price Adjustment Board to determine which of the statutory methods for eliminating such profits are available in the case under consideration. If the investigation discloses that such profits can be eliminated by withholding sums which might otherwise be owing from the United States to the person who realized the profits, steps may be taken accordingly. If the investigation discloses that the profits can be eliminated by ordering prime contractors with the United States to withhold for the account of the United States amounts which such contractors might otherwise pay to the person who had realized the excessive profits, the appropriate withholding orders may be issued. But if the investigation discloses that neither of these remedies [fol. 232] is available it is then the policy to eliminate the excessive profits by referring the matter to the Attorney General for the purpose of instituting a suit on behalf of the United States to recover the amount of such excessive profits.

An investigation has been made by the War Department with respect to the possible methods for the elimination of the excessive profits found to have been realized by Aircraft & Diesel Equipment Corporation during its fiscal year ending November 30, 1943. The investigation has failed to

disclose that there are any sums now owing from the United States to the Corporation and, accordingly, the excessive profits cannot be eliminated by withholding sums otherwise payable from the United States to the Corporation. The investigation has disclosed, however, that there are contractors doing business with the United States who owe various sums of money to the Corporation. It has been decided that the interests of the Government will be served by issuing withholding orders to two or possibly three of such contractors and it has accordingly been determined that the collection method to be adopted in this case will be the issuance of withholding orders to two or possibly three of such contractors. If this method of collection does not result in a discharge of the claim a recommendation will be made to the Attorney General that suit be brought by the United States against the Corporation to compel payment of the claim.

(S.) Maurice Hirsch, Colonel, General Staff Corps, Chairman, War Contracts Price Adjustment Board and Chairman, War Department Price Adjustment Board.

Sworn and subscribed before me this 9th day of June, 1945.

(S.) Anna C. Lanigan, Notary Public, D. C. (Seal.)

My Commission expires June 15, 1946.

[fol. 233] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF GEORGE T. WOFFORD, JR.—Filed June 15, 1945

George T. Wofford, Jr., being first duly sworn, deposes and says:

I am a Major in the Army of the United States, and am the Acting Chief of the Board Panels Section of the War Department Price Adjustment Board. In that capacity, I have charge of forwarding to contractors the statements of facts and reasons upon which unilateral determinations of excessive profits are based, as required by the 1943 Re-

negotiation Act, where the contractors have made appropriate requests for such statements.

On June 9, 1945, I inclosed the original of the attached statement dated 8 June 1945 with the original letter dated 9 June 1945, addressed to Aircraft & Diesel Equipment Corporation, a copy of which letter is likewise attached hereto, in a franked government envelope and duly sealed the envelope. The envelope was addressed to Aircraft & Diesel Equipment Corporation, 4401 N. Ravenswood Avenue, Chicago, Illinois. I then duly deposited that envelope, containing the aforesaid inclosures, in a mail box regularly maintained by the United States Government at The Pentagon, Washington 25, D. C. There was at the time of said deposit, and has been at all times here in question, regular [fol. 234] communication by mail between The Pentagon and the above stated address of Aircraft & Diesel Equipment Corporation.

(Sgd.) George T. Wofford, Jr., Major, A. U. S., Acting Chief Board Pra elsSection, War Department Price Adjustment Board.

Sworn and ubscribed before me this 12th day of June, 1945. (S.) Edward L. Davis, Notary Public, D. C. (Seal.) My Commission expires July 14, 1946.

[fol. 235] EXHIBIT "A"

To: Aircraft & Diesel Equipment Corporation, Chicago, Illinois, Fiscal Year ended 30 November 1943

In accordance with the provisions of subsection (c)(1) of the Renegotiation Act, you are hereby furnished a statement showing, for your fiscal year above set forth, the determination of excessive profits for said fiscal year and the facts and reasons upon which the determination was based. This statement is final only in the event that the determination by order to which it relates is final.

1. DETERMINATION OF EXCESSIVE PROFITS.

Pursuant to the provisions of the Renegotiation Act it has been determined by order dated 11 January 1945 that of the profits received by or accrued to you during said fiscal year under contracts and subcontracts subject to re-

negotiation the amount of $1,265,000 constitutes profits which should be eliminated.

2. Summary of Relevant Facts.

a. Financial Statement

There are attached hereto exhibits numbered 1, 2, and 3, containing the following information:

"Exhibit 1" contains comparative balance sheets prepared from those furnished by you and indicates your financial position as of the end of the fiscal year ended 30 November 1940 and as of the end of each fiscal year thereafter to and including 30 November 1943. [fol. 236] "Exhibit 2" contains comparative income statements prepared from those furnished by you for the fiscal periods ended 30 November 1937 to 30 November 1943 inclusive.

"Exhibit 3" is a reconciliation of the figures for the year ended 30 November 1943 shown on Exhibit 2 to the information submitted by you.

b. Other Facts Related to the Determination.

1. Efficiency of Contractor

The dollar amount of total net sales during the year ended 30 November 1943, before adjustment for the renegotiation refund, was approximately 11.8 times the average for the base period years 1937-1939. It represented an increase of about 31% over the unadjusted total of sales for the previous fiscal year. Unit production figures are not available for comparison but the Contractor is recognized as having produced in 1943 large quantities of high quality precision products. Prompt delivery schedules were maintained and rejections were held to a low rate. Cost comparisons are difficult because of the wide variety of products manufactured and the different specifications under which similar products may have been produced. On the basis of available data, however, it was concluded in renegotiation that the Company was somewhat better than a medium cost producer. Its unit costs in 1943 were recognized as being lower than in 1942, although there is no evidence that this was due to any factor other than increased volume.

2. Reasonableness of Costs and Profits

The Contractor's selling and advertising expenses for 1943 were low in relation to the year's sales. Officers' compensation, on the other hand, was considered exorbitant and 45% of the amount paid was disallowed in renegotiation. The $150,000 of officers' compensation which remained [fol. 237] equalled 4.2% of sales and was thought to be a liberal allowance for services performed.

The Company's dollar volume of sales in 1943 amounted to $3,549,000 of which $3,520,000 was determined to be renegotiable. This compares with the Company's average total sales amounting to $347,000 for the years 1937 through 1939. For the year ended 30 November 1942, the Company had renegotiable sales amounting to $2,446,000 before adjusting for a refund amounting to $775,000.

The Company's profits on renegotiable sales during 1943 amounted to $1,526,000 before taxes or 43.3% of sales. This compares with average profits amounting to $38,000 before taxes or 12.7% of sales for the base years 1937-1939. For its 1942 fiscal year the Company realized profits on its renegotiable sales amounting to $972,000 or 39.7% before taxes and before adjustment. After adjusting for a refund of $775,000 for that year the Company's profits on renegotiable sales before taxes amounted to $197,000 or 11.8% of adjusted sales.

The Company's renegotiable sales volume for 1943 after renegotiation was 7.5 times its average sales volume for the years 1937-1939. The Company's profits on renegotiable sales for 1943, after renegotiation and before taxes, was 6.9 times total average profits realized for the years 1937-1939.

The Company's wartime and peacetime products are essentially the same. It manufactures Diesel injection equipment and a variety of custom made precision parts. The operations of the Contractor are in effect those of a completely equipped machine shop capable of doing all types of work. The major war time production problem of the Company has been the necessity for meeting a greatly in- [fol. 238] creased demand for its regular line products.

3. Amount and Source of Capital

The Company began the year under review with a net worth (adjusted by the renegotiation refund for 1942) of $450,000. No new capital was added during 1943 except

from profits. There was retired during the year $65,500 of 5% notes, representing the unpaid portion of $100,000 of notes issued in 1940 by the present management to acquire control, and other loans amounting to $33,000. There was also retired during 1943, after payment of $79,624 accrued dividends, 8.520 shares of $1 par preferred stock. These disbursements aggregated $247,000 or over 50% of the beginning net worth. The Corporation's gross plant account at 30 November 1943 was carried at $441,000, of which $115,000 was covered by Certificates of Necessity. Amortization charged on the latter amounted to $22,000 for 1943 and the Company's net plant account at the year end after deduction of amortization and depreciation reserves amounted to $299,000 compared with a net plant account amounting to $292,000 at the beginning of the year.

During 1943 the Company was assisted through use of $150,000 of customer-furnished DPC machinery. This was equivalent to about 25% of total facilities and was used in the production of about 25% of total business. The Company had no V loans, received no advance payments nor any other financial assistance during the year under review.

The Company's cost on renegotiable sales in 1943 amounted to 99% of its total cost of sales. Based upon the allocation of 99% of initial net worth to renegotiable business the Company's profit on renegotiable business before renegotiation and taxes amounted to about 340% on such allocated net worth, and to 58% after renegotiation and before state and federal taxes.

[fol. 239] 4. Extent of Risk Assured

The Contractor invested about $23,000 in additional facilities during 1943, all of which were covered by Certificates of Necessity. Since 1940, total purchases have aggregated approximately $150,000, of which $120,000 are covered by Certificates of Necessity. Depreciation and amortization charged by the Contractor in 1943 totaled $39,000. Included in this amount is $22,000 which represents the amount of amortization of emergency facilities which were covered by Certificates of Necessity.

The Company's wartime business has not involved any substantial increase in investment in plant facilities. Accordingly, no substantial problems of reconversion to pre-war business have been created. A substantial amount of

DPC facilities were furnished by prime contractors. Inventory is largely covered by orders, and the turnover is rapid in relation to the cost of sales. The major part of materials used were furnished the Company without charge.

The Contractor assumed no particular risk with respect to pricing. Its prices in general were competitive, however, and some price reductions were made on repeat orders. Basic profit for the year ended 30 November 1943 before refund amounted to 43.3% of sales and for the previous fiscal period renegotiated the Company had a profit margin before renegotiation of 39.7%.

5. Contribution to the War Effort

The Company's primary contributions to the war effort were the quantity and quality of its production. Also, it cooperated fully with its principal customers, making available to them upon request its designs, drawings and manufacturing technique in order that they might produce similar parts for themselves or obtain them from other shops. The Company's low rejection and scrap record effected savings in critical material and manpower. It made no particular engineering or developmental contributions.

[fol. 240] 6. Character of Business

The Company is a well-integrated custom machine shop performing manufacturing processes of above average complexity. As is indicated from the fact that material cost amounted to only 12% of the total cost of sales, considerable value was added in manufacture. A large part of production materials used, principally steel bar stock, forgings and castings, were supplied to the Contractor without charge. The value of this customer furnished material was considered to be substantial although an accurate total was not supplied in renegotiation. Turnover of beginning net worth of approximately 7.5 times in the year under review was relatively high for this type of business. It reflects in considerable measure the worth of facilities furnished the Contractor by its customers.

3. Reasons for the Determination.

The above facts and the statutory factors considered as indicated above were the basis for the following conclusions and reasons for the determination as specified in paragraph 1.

The combination of such factors indicates that in the year under review the Contractor's principal contribution to the war effort consisted of the production of its peacetime products in increased volume. The Contractor's conversion and reconversion risks were thus limited. The major portion of productive materials used were furnished the Contractor without charge which held inventory risks to a minimum. The Contractor added high value in manufacture and was given credit on this account. Its performance was rated from good to excellent, indicative of efficient operation.

Government facilities accounted for nearly one fourth of total production. The emergency facilities provided by the Contractor were for the most part covered by Certificates of Necessity. No V loans or financial assistance of any kind was provided the Contractor in the year under review. [fol. 241] Manufacturing operations conducted were of above average complexity and the Contractor accepted difficult work which had been refused by other shops. Base period earnings were given only limited significance in this case although it is noted that after renegotiation but before taxes on income the Contractor will have realized profits on its renegotiable sales for 1943 which are many times the average profits realized for 1937-1939.

In comparison with the expenses of manufacturers of similar volume and of similar items, the Contractor's controllable expenses, other than Officers' compensation, were considered reasonable. Renegotiable profits after adjustment but before Federal taxes represented 58% on the allocable net worth at the beginning of the year 1943 and also represented 11.6% of adjusted renegotiable sales as indicated on Exhibit 2 attached.

This determination was based on the facts outlined in the above statement and after full consideration of all information supplied by the contractor, both written and oral, and of the factors referred to in subsection (a)(4)(A) of the Renegotiation Act. In view of the above facts, factors and information, the determination is considered just and equitable.

War Department Price Adjustment Board, Maurice Hirsch, Colonel, General Staff Corps, Chairman.

[fol. 242]

EXHIBIT 1

Aircraft & Diesel Equipment Corporation

Comparative Balance Sheets

(000 Omitted)

	November 30			
	1943	1942	1941	1940
Current Assets				
Cash	$350	$631	$47	$17
Notes & Accounts Receivable	336	294	87	29
Tooling Cost Due from U. S. Govt.	....	45	....	....
Inventories	298	206	189	93
Total Current Assets	$984	$1176	$323	$139
Current Liabilities				
Notes and Accounts Payable	$26	$122	$100	$72
Accrued Expenses	70	85	47	27
Payroll Deductions	24	4		
Net Cost of 1942 Renegotiation	204	204		
Reserve for Federal Income Taxes—net	407**	658**	91	
Total Current Liabilities	$731	$1073	$238	$99
Net Working Capital	$253	$103	$85	$40
Property, Plant & Equipment—net*	299	292	322	273
Prepaid & Deferred Expenses	23	22	14	13
Other Assets	113	42	60	81
Total	$688	$459	$481	$407
Less: Other Liabilities		9	98	161
Total Net Assets	$688	$450	$383	$246
Net Worth:				
Preferred Stock	$25	$33	$33	$33
Common	300	300	300	300
Paid—In Surplus	198	259	259	259
Earned Surplus	465**	158**	91	(46)
Total	$988	$750	$683	$546
Less: Goodwill, Designs, etc.	300	300	300	300
Total Net Worth	$688	$450	$383	$246
*Property, Plant & Equipment:				
Defense Plant Facilities:				
Buildings	$28	$22		
Machinery & Equipment	92	78	77	
	$120	$100	$77	none
Regular Facilities:				
Land & Buildings	$92	$91	$91	$90
Machinery & Equipment	229	223	275	270
	$324	$314	$366	$360
Total Property, Plant & Equip.—Gross	$441	$414	$443	$360
Less: Reserves for Deprec. & Amortiz.	142	122	121	87
Total Property, Plant & Equip.—Net	$299	$292	$322	$273

**Taxes are shown per audit reports, rather than at amounts per tax returns; however, taxes per audit have been adjusted to extent of surplus adjustment at 11/30/45 based on Revenue Agent's Report.

(Here follows, Exhibit 2, side folio 243)

[fol. 243]

EXHIBIT 2

Aircraft & Diesel Equipment Corporation

Comparative Statement of Income

	Year Ended November 30, 1943					Year Ended November 30, 1942			
	Before Renegotiation			After Renegotiation		After Renegotiation			
	Renego'ble Business	Non-Reneg. Business	Total	Renego'ble Business	Total	Renego'ble Business	Non-Reneg. Business	Total	1941
Sales (Less Allowances, Discounts, etc.)	3,519,825	29,020	3,548,845	2,254,825	2,283,345	1,671,329	260,148	1,931,477	1,105,107
Cost of Sales (Less Discounts)	1,726,535	13,925	1,740,460	1,726,535	1,740,460	1,269,542	149,729	1,419,271	721,630
General, Admin. & Selling Expenses	267,452	2,184	269,636	267,452	269,636	183,161	142,451	325,612	130,161
Operating Profit	1,525,838	12,911	1,538,749	260,838	273,749	218,626	(32,032)	186,594	253,316
% of Sales—Line 1	43.3%	44.5%	43.3%	11.6%	12.0%	13.1%	.....	9.7%	22.9%
Other Applicable Items									
a. Interest Paid	3,353	27	3,380	3,353	3,380	10,401	1,104	11,505	23,794
b. Other Applicable Deductions	.....	.....	.....	.....	.....	11,300	1,200	12,500	.....
c. Other Applicable Income	(3,504)	(28)	(3,532)	(3,504)	(3,532)	.....	.....	.....	.....
Basic Profit Before Adjustment	1,525,989	12,912	1,538,901	260,989	273,901	196,925	(34,336)	162,589	229,522
Renegotiation Adjustments	.....	.....	.....	.....	.....	.....	.....	.....	.....
Basic Profit for Renegotiation—Fixed Price	1,525,989	12,912	1,538,901	260,989	273,901	196,925	(34,336)	162,589	229,522
% of Sales—Line 1	43.3%	44.5%	43.3%	11.6%	12.0%	11.8%	.....	8.4%	20.8%
Other Income	.....	.....	.....	.....	.....	.....	.....	.....	(680)
Other Deductions	.....	1,979	1,979	.....	1,979	.....	6,222	6,222	.....
Renegotiation Adjustments—Net	142,293	1,158	143,451(A)	142,293	143,451	.....	.....	.....	.....
Profit before Provision for Taxes on Income & Extraordinary Reserves	1,383,696	9,775	1,393,471	118,696	128,471	196,925	(40,558)	156,367	230,202
Provision for Federal Taxes on Income—Gross	.....	.....	1,089,389	.....	95,171	.....	.....	.....	97,925
Post-War Refund of Excess Profits Tax (Credit)	.....	.....	71,118	.....	.....	.....	.....	102,000(E)	.....
Net Profit before Extraordinary Reserves	.....	.....	375,200	.....	33,300	.....	.....	54,367	132,277
% of Net Worth at Start of Period	.....	.....	83%	.....	7%	.....	.....	14%	54%
Provision for Extraordinary Reserves	.....	.....	[redacted]6,930(B)	.....	.....	.....	.....	.....	(6,425)(C)
Net Profit per Contractor	.....	.....	[redacted]2,130	.....	33,300	.....	.....	.....	138,702

(A) Composed of:

Disallowed Salaries	$126,052
" Amort.	517
" Bad Debts	16,882
	$143,451

(B) Taxes per returns filed in excess of Provision in audit.

(C) Additional assessment for Federal Income Taxes recorded on books in 1943 year.

(E) Estimated.

( ) Indicates loss.

Years Ended November 30			
1940	1939	1938	1937
487,493	187,323	204,560	509,252
423,114	163,545	156,689	296,939
78,412	45,409	26,042	86,031
(14,033)	(21,631)	21,879	126,282
.....	.....	10.7%	24.8%
13,210	4,129	2,532	3,502
.....	.....	.....	.....
.....	.....	.....	.....
(27,243)	(25,760)	19,347	122,780
.....	.....	.....	.....
(27,243)	(25,760)	19,347	122,780
.....	.....	9.4%	24.0%
(565)	.....	(687)	(11,718)
.....	225	.....	1,288
.....	.....	.....	.....
(26,678)	(25,985)	20,034	133,210
.....	.....	5,076	17,228
.....	.....	.....	.....
(26,678)	(25,985)	14,958	115,982
.....	.....	.....	.....
C)	.....	.....	.....
(26,678)	(25,985)	14,958	115,982

[fol. 244]

EXHIBIT 3

Aircraft & Diesel Equipment Corporation

Year Ended 30 November 1943

Reconciliation of Exhibit 2 with Contractor's Statements

		Before Renegotiation & Taxes	
		Renegotiable Business	Total Business
Per Exhibit 2	Sales	$3,519,825.02	$3,548,845.50
	Profits	1,525,988.43	1,538,900.95
Per Contractor	Sales	3,519,825.02	3,548,845.50
	Profits	1,381,731.83	1,393,470.36
Reconciliation of Sales			
"Renegotiable"		2,207,574.95(A)	
"Standard Commercial Articles"		1,312,250.07(A)	(C)
Per Contractor & Per Exhibit 2		3,519,825.02	3,548,845.50(A)
Reconciliation of Profits			
"Renegotiable"		858,477.62(A)	
"Standard Commercial Articles"		523,254.21(A)	(C)
Per Contractor		1,381,731.83	1,393,470.36(A)
Add: Amortization not claimed for tax purposes		517.56	517.56(B)
Add: Bad debts not claimed for tax purposes		16,745.15	16,881.89(B)
Per Income Tax Return			1,410,869.81
Add; Salaries disallowed		125,030.59	126,051.61
Transfer of loss on sale of capital assets to other deductions		1,963.30	1,979.33(A)
Basic Profit per Exhibit 2		1,525,988.43	1,538,900.75

(A) Per Exhibit D Attached to brief titled "Supplemental Renegotiation Data" signed by Mr. B. Ch. Kelleher, President, received by Service 15 June 1944.

(B) Per photostat of income tax return, Form 1120, for year ended 30 November 1943.

(C) Per audit report of Lybrand, Ross Brothers & Montgomery, dated 14 January 1944.

[fol. 245] EXHIBIT "C"

Copy

Filed Jun 15, 1945, Charles E. Stewart, Clerk,

9 June 1945

Aircraft & Diesel Equipment Corporation
4401 N. Ravenswood Avenue
Chicago, Illinois
Gentlemen:

In accordance with your request, there is transmitted herewith a statement showing, for your fiscal year ended 30 November 1943, the determination of excessive profits for said fiscal year and the facts and reasons upon which the determination was based.

For the Chairman:

(S.) George T. Wofford, Jr., Major, A.U.S. for William C. Martens, Lt. Colonel, A.U.S., Chief, Renegotiation Branch.

[fol. 246] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF B. CH. KELLEHER—Filed June 18, 1945

CITY OF WASHINGTON,
District of Columbia, ss.:

B. Ch. Kelleher, being first duly sworn, deposes and says:

That he is now, and has been since June 1, 1940, the President of Aircraft & Diesel Equipment Corporation; that he is authorized to make this affidavit for and on behalf of the corporation.

Affiant further states that the Diesel Equipment Corporation was incorporated November 30th, 1936 under the laws of the State of Delaware preparatory to acquiring all the assets of a New York company of the same name; that the incorporation and the acquisition of the assets of the New York company was prompted by the fact that the

[fol. 247] New York company had just prior thereto entered into a contract with the Allis-Chalmers Company wherein the latter agreed to purchase from the New York company its entire requirements of Diesel fuel injection equipment, and it was deemed advisable to provide additional funds to finance the anticipated expansion resulting from the Allis-Chalmers contract; that during the fiscal year, December 1, 1936 to November 30th, 1937 with the performance of that contract, the company's total sales were $509,252.43, upon which the company realized a profit of $133,210.22 before Federal taxes; or 28.165% of sales, and after taxes a profit of $115,982.13, or 22.775% of sales; that in the year 1937 Allis-Chalmers changed the design of its engine and discontinued the purchase of fuel ejectment equipment from the Diesel Equipment Company.

Affiant further states that during the years 1938 and 1939 the manufacture of Diesel equipment was necessarily reduced due to the loss of the Allis-Chalmers contract, and to the fact that the equipment previously manufactured for Allis-Chalmers was not readily adaptable for use by other purchasers of Diesel fuel injection equipment, and required changes and alterations in order that it might be offered for sale to users of Diesel fuel equipment generally; that during said period, 1938 and 1939, the company also deemed it necessary to re-tool, re-design and equip the shop for the [fol. 248] manufacture of aircraft precision parts, which prior to that time had been a relatively small portion of the company's business. That said years 1938 and 1939 were in fact years in which the company was preparing to take care of the volume of business subsequently realized.

Affiant further states that the years 1938 and 1939 cannot and should not be considered in any averaging of its normal earnings since said years do not represent normal activities, but represent that period of time when the company was redesigning, re-tooling and preparing itself for the commencement of its new business operations.

Affiant further states that during the years 1938 and 1939 this affiant and the present management of Aircraft and Diesel Equipment Corporation was not associated with the company; but this affiant is advised from customers of the company during said years that the products manufactured during that period of time were not equal in quality of the present products, and it was not until this

affiant and his associates took over the management of this company that its products, prices and deliveries were satisfactory to its customers.

Affiant further states that during the year 1940 the name of the corporation was changed to that of Aircraft and Diesel Equipment Corporation, and that the present management of the company, assuming control in June, 1940, changed personnel, facilities, machinery to the end that [fol. 249] more satisfactory products could be made and a greater sales volume secured, that during the year ended November 30th, 1941, the total sales of this company were $1,105,106.75 upon which this company realized a profit before taxes of $230,202.22, or 20.83% of its total sales; that after payment of Federal income taxes in the amount of $91,500, the company's operations resulted in a net profit of $138,702.22, or 12.551% of its sales; that for the year 1942 the total sales of Aircraft and Diesel were $2,706,477.33, leaving a profit before taxes of $931,366.64, or 34.413% of its sales, and that after payment of Federal income and excess profit taxes in the amount of $667,591.17, there remained a profit of $263,775.47, or 9.746% of its sales; that for the year 1943 Aircraft and Diesel's total sales were $3,548,845.50, and its profits before taxes was $1,393,470.36, or 39.28% of its sales, that after provision for Federal income and excess profit taxes in the amount of $991,340.37, or 27.93% of its sales, there remained a profit of $402,129.99, or 11.33% of its sales; that if the demand for renegotiation for the year 1942 is sustained, Aircraft and Diesel's profit before provision for Federal taxes is $156,366.64, or 5.778% of its sales, and after taxes, the profit is $59,775.47, or 2.20% of its sales; that for the year 1943, if the renegotiation demand is sustained Aircraft and Diesel's profit before taxes [fol. 250] is $128,470.36, or 3.62% of its sale; after taxes, its profit is $53,729.99 or 1.51% of its total sales.

Affiant further states that during the years 1942 and 1943 the plant was operated 16 to 24 hours per day, and its maximum facilities utilized for the production of materials necessary to the war effort; that the company had no Government loans and except for equipment loaned by its several customers, received no assistance other than certificates of necessity from the United States Government; that the company made available to all its customers its designs, manufacturing technique and know-how, and extended to

each of its customers an opportunity to acquire additional articles from others who might utilize such technique.

Affiant further states that during the years 1942 and 1943 a portion of the equipment manufactured by this company changed often and substantially as the type of engine or aircraft was changed; that during said years voluntary price reductions were made based upon actual experiences that the articles could be manufactured cheaper with a reasonable profit to the company; that the nature of the products manufactured by the company are most complex requiring in some instances a tolerance of 2/100000th of an inch, and involving the use of the highest grade of steel and the utilization of the services of the highest [fol. 251] skilled mechanics.

Affiant further states what he is familiar with the operation of precision shops of the kind and character of Aircraft and Diesel Equipment Corporation, and that a fair and reasonable profit before taxes to a company operating such shop is between 35 and 40 percent of its sales; in affiant's opinion Aircraft and Diesel Equipment Corporation did not realize excessive profits during the years 1942 and 1943; that the expansion of business of Aircraft and Diesel Equipment Corporation during the years 1941, 1942 and 1943 over the prior years of 1938, 1939 and 1940 was not due solely to war conditions, but to an improved product and more satisfactory prices and full and complete compliance with delivery schedules; that by 1940 the company had designed and manufactured a spped valve type pump, for which there was a substantial demand, and had the requirements for war products not accrued the company would have enjoyed substantial sales of said pumps, and would have realized substantial profits.

Affiant further states that Aircraft and Diesel Equipment Corporation has no outstanding bonds, has no encumbrances upon its real estate or equipment and that the fair and reasonable value of such real estate and equipment exceeds the sum of $300,000.00.

Affiant further states that he has read the affidavit of [fol. 252] Col. Maurice Hirsch to the effect that the Government proposes to direct one or two customers of Aircraft and Diesel Equipment Corporation to withhold for the account of the United States such monies as they shall be directed, not in excess of $275,000 to discharge the renegotiation demands for the year 1943. Affiant states that

there is no combination of two or three accounts of Aircraft and Diesel Equipment Corporation which will aggregate any amount comparable to $275,000; that the three largest accounts of the company as of June 16th would not exceed $120,000, and that if the War Contracts Price Adjustment Board or the Secretary as defined in the Renegotiation Act shall attempt the collection of $275,000 by direction to Aircraft and Diesel Equipment Corporation's customers, said War Contracts Adjustment Board will be required to give such directions to at least 16 or more customers of Aircraft and Diesel Equipment Corporation.

And further affiant sayeth not.

B. Ch. Kelleher.

Subscribed and sworn to before me this 18th day of June, 1945.

Christie H. Fesler, Notary Public.

[fol. 253-254] In United States District Court

[Title omitted]

Docket Entry

1945

June 18. Heard in U. S. C. of App. constitutionality of renegotiation act; reported by Mr. Middlemiss; to amend complt; 10 days allowed defts. to answer or request oral argument; plff. 5 days to reply; concluded; submitted. Justices: Miller, Proctor, Bailey.

[fol. 255] In United States District Court

[Title omitted]

Amended and Supplemental Complaint for Declaratory Judgment, Injunction and Other Relief Filed by Leave of Court—Filed July 2, 1945

[fol. 256] General Allegations Applicable to Sections 1 and 2 hereof.

1. Jurisdiction of this Court is invoked under the provisions of Section 41, 380(a) and 400 of Title 28 U. S. C. The matter in controversy herein exceeds, inclusive of in-

terest and costs, the sum or value of $3,000, and arises under the Constitution and laws of the United States of America. This suit is brought to obtain a decree under the Declaratory Judgment Act declaring:

(a) The Renegotiation Act to be unconstitutional, null and void.

(b) If the several sections of the Act be deemed separable, and not all unconstitutional, that Sections 403(c)(2) and 403(e)(1) be declared unconstitutional, null and void.

The suit also seeks injunctive relief restraining the defendants and each of them from further proceeding under the Renegotiation Act and particularly from further proceeding under Sections 403(c)(2) and 403(e)(1) in so far as said Act and said Sections provide for the taking of plaintiff's property without any form of judicial review.

In addition the suit seeks injunctive relief restraining the defendants and each of them from taking plaintiff's property under the provisions of the Renegotiation Act and Section 403(c)(2) and Section 403(e)(1) prior to a redetermination by The Tax Court of the United States of the determination of the War Contracts Price Adjustment Board (herein sometimes called the "Board").

In the alternative the suit seeks injunctive relief under the general equity powers of this Court restraining the defendants and each of them from taking the plaintiff's property under an order dated January 11, 1945 (Exhibit "A" attached hereto and made a part hereof) prior to a redetermination of the alleged excessive profits of the plaintiff in The Tax Court of the United States, for the reason that said "Order Under Delegated Authority Determining Excessive Profits", dated January 11, 1945, was entered by the Board illegally, arbitrarily, capriciously and without regard to the evidence then before it. The enforcement of the order of January 11, 1945, will cause plaintiff irreparable injury.

Plaintiff, Aircraft & Diesel Equipment Corporation, is a corporation organized and existing under the laws of the State of Delaware, licensed to do business in the State of Illinois, and having its principal office and place of business at 4401 North Ravenswood Avenue, Chicago, Illinois. Its manufacturing plant is located at Chicago, Illinois, where

it is engaged in the business of manufacturing and selling [fol. 257] diesel fuel injection equipment and precision parts and also aircraft precision parts. Defendant, Maurice Hirsch, is a citizen of the United States and is presently a resident of the District of Columbia. Defendants W. John Kenny, John R. Paul, H. C. Maull, Jr., Gladding B. Coit, and Carman G. Blough, each are citizens of the United States and each is presently a resident of or may be found in the District of Columbia and each is a member of and together the defendants above named in this paragraph constitute a purported agency of the United States of America created by the Renegotiation Act and called the "War Contracts Price Adjustment Board", and as such purport to be charged with the duty of administering:

A. Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942 (Public Law 528, 77th Congress) approved April 28, 1942, as amended by

B. Section 801 of the Revenue Act of 1942 (Public Law 753, 77th Congress) approved October 21, 1942, as further amended by

C. Section 1 of the Military Appropriation Act of 1944 (Public Law 108, 78th Congress) approved July 1, 1943, as further amended by

D. Public Law 149, 78th Congress approved July 14, 1943, and as further amended by

E. Section 701 of the Revenue Act of 1943 (Public Law 235, 78th Congress) effective February 25, 1944,

referred to herein as the Renegotiation Act, (50 U.S.C.A. Appendix 1191). (In this Complaint the Renegotiation Act enacted February 25, 1944 is distinguished from Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942 as amended prior to February 25, 1944 by referring to the first as the "Renegotiation Act" and to the latter as Section 403 of the "Sixth Supplemental National Defense Appropriation Act of 1942, as amended".) Defendant Henry L. Stimson is a citizen of the United States and of the State of New York and is presently an inhabitant of the District of Columbia. He is Secretary of War and is a "Secretary" within the meaning of the Renegotiation Act. Defendant Robert P. Patterson is a citizen of the United States of America and of the State of New York, and he is presently an inhabitant of the District of Columbia. He is Under Secretary of War, a purported delegate of the Board

and is sometimes a purported delegate of Henry L. Stimson, Secretary of War, as a Secretary within the meaning of "Secretaries", as defined in the Renegotiation Act.

2. The Plaintiff employs the accural method of bookkeeping and keeps its accounts and makes its federal income tax returns on the basis of a fiscal year ending November 30th in each year.

[fol. 258] Section I

3. During the fiscal year ended November 30, 1942, plaintiff's total sales of the aforesaid products were $2,706,477.33, of which sales amounting to $2,446,328.55 were alleged by defendant Patterson to be subject to renegotiation which, after deducting the costs of sales and other expenses of doing business, resulted in a net profit of $940,696.89. Plaintiff's income and excess profits taxes for said year amounted to $683,255.41, leaving a net profit, after such taxes, in the amount of $257,441.48. On October 27, 1943, following numerous conferences participated in by representatives of the plaintiff and representatives of the so-called Price Adjustment Board, (an administrative body created to administer the previous Act in respect of renegotiation, not the War Contracts Price Adjustment Board created by the Renegotiation Act), the defendant, Robert P. Patterson, made a unilateral determination, purporting to act under power vested in him by, or delegated to him pursuant to the Sixth Supplemental National Defense Appropriation Act of 1942 and the amendments thereto then made, by which he determined that plaintiff had realized excessive profits for the fiscal year ended November 30, 1942, in the amount of $775,000, and in which he demanded that said amount, less the tax credit authorized by law, be paid to the Treasurer of the United States, with interest at the rate of 6% per annum from and after October 27, 1943. Enclosed with said notice of unilateral determination was the formal "Determination of Excessive Profits" signed by the said Robert P. Patterson, providing, among other things, that the alleged excessive profits in the amount of $775,000.00 so found and determined to be due should be eliminated by any of the methods provided in the Sixth Supplemental National Defense Appropriation Act of 1942 and the amendments thereto, or by any combination thereof.

The unilateral determination so made by the defendant Patterson is attached hereto and made a part hereof and marked "Exhibit B". Following such determination by defendant Patterson, plaintiff demanded that it be advised of the basis upon which such determination had been reached, but defendants Patterson and Stimson and their representatives wholly failed, neglected and refused to give plaintiff such information or any other statement of the alleged facts or factors used by defendants Patterson and Stimson in the determination of plaintiff's alleged excessive profits for its fiscal year ending November 30, 1942. In the unilateral determination, the defendant Patterson stated that as a basis for the renegotiation of the plaintiff for its fiscal year ending November 30, 1942, he considered "certain financial, operating and other data obtained" by him [fol. 259] "from governmental and other reliable sources." But the plaintiff was afforded no opportunity to examine or rebut any of the said extraneous data so obtained and considered by the defendants Robert P. Patterson, Henry L. Stimson and their subordinates. Neither the so-called Price Adjustment Board nor defendants Patterson or Stimson made any findings of fact as a basis for said determination, or, if the same were made, they were never communicated to plaintiff, and plaintiff's request for a statement and basis of determination has been refused, as shown by "Exhibit C" attached hereto and made a part hereof.

4. On May 18, 1944, plaintiff filed in The Tax Court of the United States its Petition of Redetermination under the Renegotiation Act of alleged excessive profits, so asserted by defendants to have been realized by it during the fiscal year ended November 30, 1942, which said petition was entitled "Aircraft & Diesel Equipment Corporation, Petitioner, vs. Henry L. Stimson, Secretary of War of the United States, and Robert P. Patterson, Under Secretary of War of the United States, Respondents, Renegotiation Docket No. 9"; that by said petition, plaintiff sought a determination regarding the constitutionality of said Renegotiation Act and a redetermination of the said determination of excessive profits so made by the defendant, Robert P. Patterson, intending thereby to submit its case to The Tax Court of the United States for an orderly and just determination of its liability, if any. In the event such Rene-

gotiation Act be declared constitutional, plaintiff purposes to and will make such refund to the Treasury of the United States as is ultimately determined to be due. However, well knowing that the plaintiff intended to file its petition in The Tax Court of the United States, Robert P. Patterson, defendant herein, on or about the 29th day of April, 1944, arbitrarily, unlawfully and without right, directed contractors, plaintiff's customers (other than the United States of America or any department, agency, or instrumentality thereof) to whom it had sold its products, to withhold for the account of the United States money due plaintiff as subcontractor, in amounts aggregating $204,000. Thereafter, on or about the 19th day of July, 1944, while the petition filed May 18th, 1944, for redetermination of alleged excessive profits for its fiscal year ending November 30, 1942, was still pending and undetermined before The Tax Court of the United States, the said Robert P. Patterson, purporting to act pursuant to the Renegotiation Act, arbitrarily, unlawfully and without any right whatsoever, directed contractors, plaintiff's customers, and persons, firms and corporations (other than the United States of America or [fol. 260] any department, agency or instrumentality thereof) who were indebted to petitioner for its products sold by petitioner, to pay into the Treasury of the United States the sum of $204,000.00, and such contractors, customers of the plaintiff so indebted to petitioner made such payments in order to avoid penalties threatened to be imposed by the said Patterson; that as a result of such arbitrary and unlawful action on the part of Patterson, defendant, the plaintiff was deprived of the sum of $204,000.00, thereby impairing the working capital of the plaintiff and making it more difficult for the plaintiff to continue its manufacturing operations which are essential to the war effort.

5. During the fiscal year ended November 30, 1943, plaintiff's total sales, less returns and allowances, amounted to $3,548,845.50 and the cost of said sales, labor material and other business expenses amounted to $2,155,375.14, leaving a net profit before Federal taxes of $1,393,470.36. Plaintiff's income and excess profits taxes for said year amounted to $991,340.37, leaving a net income after provision for said taxes, in the amount of $402,129.99.

Plaintiff alleges that in the original Complaint filed herein, plaintiff inadvertently but erroneously alleged in Paragraph (5) of its complaint that:

> "And during such fiscal year the plaintiff had no contracts with the United States of America, nor did it do any work under any contract which it had with the United States of America."

Plaintiff now alleges that on May 21, 1941, it made and entered into a contract with the United States Navy Department, in and by which plaintiff agreed to furnish certain pumps to the United States Navy, and that on March 17, 1942, pursuant to the request of the United States Navy, it entered into an agreement supplemental to said contract of May 21, 1941, by which plaintiff agreed to furnish certain pumps and fuel injector equipment to the United States Navy; that during the fiscal year ended November 30, 1943, it furnished to the Navy Department pumps and injectors as had not been previously furnished on the supplemental contract of March 17, 1942, and that the sales price of such articles so delivered in the fiscal year ended November 30, 1943 amounted in the aggregate to $174,165.00 as is more fully shown by the affidavit of B. Ch. Kelleher attached hereto and made a part hereof in respect to Navy sales.

Plaintiff further alleges that such pumps and injector equipment as were delivered by plaintiff to the United States Navy in the fiscal year ended November 30, 1943, were all paid for by the United States of America on or prior to the 27th day of August, 1943.

6. On or about December 10, 1944, a representative of [fol. 261] the Chicago Office of the War Contracts Price Adjustment Board advised plaintiff orally that it had determined that plaintiff had realized excessive profits of $1,265,000.00 in the fiscal year ended November 30, 1943, upon its total sales, and that in computing the profits which plaintiff should be permitted to retain after renegotiation, the total sales should be reduced by the sum of $1,265,000.00, leaving what its representative called "net adjusted sales" for said year, in the amount of $2,283,845.50. Said representative then requested plaintiff herein to acquiesce in such determination and to enter into an agreement with the War Contracts Price Adjustment Board for the elimination of such alleged excessive profits in the sum of $1,265,000.00

less appropriate tax adjustments for taxes paid by plaintiff. Plaintiff declined and refused to acquiesce in such determination or to enter into the agreement so suggested, and the representative of the Chicago Office of the War Contracts Price Adjustment Board then advised plaintiff that the entire matter was closed so far as the Chicago Office was concerned and that all data, statements and reports of the plaintiff would be forwarded immediately to the War Contracts Price Adjustment Board, Washington, D. C., for such action as the Board might desire to take. At no time during said proceedings had or taken in Chicago by the Chicago Office of the Board, did the Board, the Chicago Office of the Board, or any of its representatives furnish the plaintiff herein with any written report of its determination, the basis therefor, or the facts or factors considered.

7. In December, 1944, and on January 9, 1945, plaintiff's representatives attended conferences in the office of the War Contracts Price Adjustment Board in Washington, D. C., at which conferences representatives of the defendant, Robert P. Patterson as delegate of the Board, were present. At each of said times, plaintiff protested the aforesaid proposed determination that plaintiff had realized $1,265,000.00 excessive profits from its sales alleged to be subject to renegotiation in the fiscal year 1943, and contended, as it had repeatedly done theretofore, that any such determination would be grossly improper, unlawful and unwarranted on the grounds and for the reasons hereinafter set forth in paragraphs 17 and 22 of this complaint. At said times, plaintiff also requested that there be disclosed to plaintiff the facts, factors and reasons as well as the basis underlying said proposed determination and what data and information if any had been considered by the representatives and delegates of the War Contracts Price Adjustment Board in the proposed determination and how such facts, factors, reasons and basis had been applied in the determination of the excessive profits, of the plaintiff for the fiscal year ended November 30, 1943. Except for a confirmation of the [fol. 262] disclosure theretofore made by the Chicago Office concerning the disallowance of officers' salaries in the amount of $125,000.00, of $20,000.00 additional disallowed costs as alleged in paragraph 21 hereof, and the inclusion of sales of Standard Commercial Articles in the base for its determination, the said conferees, representing the Board

or its delegate, the defendant Robert P. Patterson, failed, neglected and refused to disclose (a) the basis, if any, upon which they proposed to determine that plaintiff realized $1,265,000.00 excessive profits, (b) the facts or factors, if any, which were considered in reaching said conclusion, or (c) the information considered in determining the matter.

8. On or about January 11, 1945, plaintiff was notified of the entry and issuance of an order by the said Robert P. Patterson purporting to act under the Renegotiation Act as a delegate of the War Contracts Price Adjustment Board, by which it was determined by the said Patterson that plaintiff had realized excessive profits for the fiscal year ended November 30, 1943, in the amount of $1,265,000.00, and by which plaintiff was directed to pay said sum, less applicable taxes previously paid, to the Treasurer of the United States. A true and correct copy of the letter of notification is attached hereto and made a part hereof as Exhibit "D". With the letter of notification was enclosed the formal "Order Under Delegated Authority Determining Excessive Profits", (Exhibit "A").

9. On February 28, 1945, the plaintiff filed in accordance with the provisions of Section 403(d)(5) of the Renegotiation Act, with the War Contracts Price Adjustment Board, its request to said Board to initiate a review of the purported determination made by the said Robert P. Patterson, as delegate of the War Contracts Price Adjustment Board (Exhibit "A"). The receipt of this request to initiate such review was acknowledged by the Board on March 3, 1945. Each of these dates, namely February 28, 1945 and March 3, 1945, were within sixty days from January 11, 1945, the date of the "Order Under Delegated Authority Determining Excessive Profits" issued by Robert P. Patterson, as delegate of the Board.

10. On May 3, 1945, the Board entered an order declining and refusing to initiate a review of the determination made by its delegate, Robert P. Patterson, in respect of excessive profits of the plaintiff for its fiscal year ended November 30, 1943; a copy of such order is attached hereto marked "Exhibit E". The order of the Board entered January 11, 1945, (Exhibit "A") thereby became and was the order of the Board as of the date (May 3, 1945) the Board declined and refused to review such order (Exhibit

"A"). Under the provisions of Section 403(c)(2) of the [fol. 263] Renegotiation Act, the Board may direct the defendant, Henry L. Stimson, as a Secretary (as Secretaries are defined in the Renegotiation Act) to direct contractors or subcontractors for whom the plaintiff had done work under contracts or pursuant to sales orders, to withhold such amounts of money due to the plaintiff as will aggregate $1,265,000.00, less applicable tax adjustments.

11. In the said order of January 11, 1945, (Exhibit "A") defendant, Robert P. Patterson, acting as a delegate of the War Contracts Price Adjustment Board, stated that as a basis for the renegotiation of the plaintiff for its fiscal year ended November 30, 1945, he gave due consideration to certain financial, operating and other data obtained by him from governmental and other reliable sources, and to all the factors referred to in sub-section (a)(4)(A) of the Renegotiation Act. The plaintiff has been afforded no opportunity to examine or rebut any of the said extraneous data considered by the defendant Robert P. Patterson, acting as a delegate of the War Contracts Price Adjustment Board, by the Board, or by its or his delegates or subordinates, or to examine or cross-examine the source of "certain financial, operating or other data relating to" plaintiff's business, which was "obtained from governmental and other reliable sources" and which was considered by the delegates of the War Contracts Price Adjustment Board and the Board in making the determination embodied in its order (Exhibit "A") and its determination not to initiate a review of such determination. Nor was the plaintiff afforded any opportunity to present any arguments or contentions based upon such financial, operating or other data obtained from "governmental or other reliable sources." Further, there are no findings of fact made by the Board or embodied in the order or any of the proceedings precedent to the issuance of the order upon which the contentions and arguments of the plaintiff might be based.

12. Plaintiff was afforded an opportunity to be heard, but was denied the right to examine some of the matters and things which the Board deemed pertinent to and considered in determining excessive profits, and accordingly it could not know all the matters and things about which it might present arguments and contentions.

On April 6, 1945, Plaintiff requested the War Contracts Price Adjustment Board to furnish it with the statement which the Board is required to furnish to the Plaintiff under the provision of Section 403(c)(1) of the Renegotiation Act, setting forth the determination made and the facts used as a basis thereof and the reasons for such determination. The War Contracts Price Adjustment Board failed and refused to forward such statement until after the original complaint in this cause had been filed, and there-[fol. 264] after on or about June 9, 1945, the War Contracts Price Adjustment Board mailed to Plaintiff a statement dated June 8, 1945, purported to be in compliance with said Section 403(c)(1). Said statement of the basis of such determination is now before this Court in the form of an affidavit made by George T. Wofford, Major, filed on the 16th day of June 1945 and such statement so mailed to Plaintiff and as shown by the affidavit of George T. Wofford is the only information that Plaintiff has in respect of the War Contracts Price Adjustment Board's determination. If the defendants do as they propose to do and as is stated in the affidavit of Maurice Hirsch filed in this cause and as it is alleged in paragraph 43 of this complaint the defendants will do, such statement is of no benefit to the Plaintiff.

13. On April 4, 1945, the plaintiff filed, pursuant to right granted by Section 403(e)(1) of the Renegotiation Act, its petition in The Tax Court of the United States to redetermine its excessive profits, if any, realized during its fiscal year ended November 30, 1943. The United States filed a motion to strike this petition on the ground that it was filed during the time when the War Contracts Price Adjustment Board might initiate a review. This motion was heard before The Tax Court on May 16, and in the event that The Tax Court shall dismiss said petition filed April 4, 1945, the plaintiff herein will file another petition in The Tax Court of the United States for redetermination of such excessive profits, a copy of which petition is attached hereto, marked "Exhibit F". In and by said petition filed April 4, 1945, or said new petition, if one be filed (Exhibit "F"), the plaintiff seeks a determination regarding the constitutionality of the Renegotiation Act, and the lawfulness and propriety of the determination of the alleged excessive profits as made by the said Robert P. Patterson, acting as

a delegate of and for the War Contracts Price Adjustment Board, intending thereby to submit its case for an orderly and just determination of its liability, if any, and in the event said Act is held constitutional, to make payment to the Treasury of the United States, in such amount, if any, as may be ultimately determined to be due.

14. Plaintiff refused and still refuses, for the reasons set forth herein, to acquiesce in the determination of the War Contracts Price Adjustment Board, that during the fiscal year ended November 30, 1943, it realized excessive profits of $1,265,000.00 on its sales alleged to be subject to renegotiation, and plaintiff refused and still refuses to eliminate said sum of $1,265,000.00 as proposed and demanded by the said War Contracts Price Adjustment Board, acting through and by Robert P. Patterson, its delegate, and plaintiff desires, as is alleged in paragraph 13 hereof, to have an [fol. 265] orderly and just determination made of its liability, if any, in The Tax Court of the United States upon its petition heretofore filed to determine such liability, if any, unless the Renegotiation Act shall have been declared unconstitutional.

15. Notwithstanding the fact that the plaintiff has filed its petition for redetermination in The Tax Court of the United States whereby it seeks an orderly determination of the amount, if any, it may owe to the United States of America, as excessive profits for its fiscal year ending November 30, 1943, the War Contracts Price Adjustment Board, purporting to act under the provisions of Section 403(c)(2) of the Renegotiation Act, purposes to direct the defendant Henry L. Stimson, Secretary of War, or his delegates, to direct contractors, customers of the plaintiff, to withhold moneys due to the plaintiff by such contractors for the account of the United States, in amounts determined by it, the War Contracts Price Adjustment Board, to be due as excessive profits, and Henry L. Stimson, Secretary of War, or his delegates purposes to follow such directions of the War Contracts Price Adjustment Board and further to direct such contractors to pay such sums of money into the Treasury of the United States, in accordance with the procedure adopted by Henry L. Stimson, Secretary of War, acting through his delegate, Robert P. Patterson, in respect of excessive profits found by him to be due for the fiscal year of the plaintiff ending November 30, 1942, as hereto-

fore, recited in this complaint, before The Tax Court of the United States of America shall have made or shall have had opportunity to make any determination of this plaintiff's petition for a redetermination of its excessive profits, if any, for its fiscal year ending 1943. In the event of such a seizure of such amounts due to the plaintiff or the payment thereof by customers of the plaintiff to the Treasury, the amounts so seized or paid would be transferred to the surplus fund of the United States Treasury, as is provided by said Renegotiation Act.

16. There was, as of May 1, 1945, due plaintiff from its customers (they being firms, individuals and corporations, other than the United States of America, or any department, agency or instrumentality thereof) approximately $274,000.00, and on that date plaintiff had on its books unfilled orders from such customers and others (not the United States of America or any department, agency or instrumentality thereof), calling for the manufacture and sale of its products at prices approximately aggregating $890,000.00. The said sums now due, or such portion thereof as the War Contracts Price Adjustment Board has determined should be withheld and paid into the Treasury, and other sums which may become due in the future, Henry L. Stimson or his delegates will, as his delegate Robert P. [fol. 266] Patterson did in a prior year, direct to be withheld from the plaintiff and paid into the Treasury of the United States. Plaintiff avers that, after adjustment for Federal income and excess profits taxes, the amount involved in the order and decision of War Contracts Price Adjustment Board does not and can not exceed $275,000.00, but defendant Henry L. Stimson, acting at the threatened direction of the War Contracts Price Adjustment Board nevertheless threatens to, and will, unless enjoined and restrained, order the withholding from the plaintiff and the payment by plaintiff's customers of said sums of money into the Treasury of the United States.

17. Plaintiff alleges that said Renegotiation Act, in so far as it purports to subject plaintiff to renegotiation and requires it to pay any sum whatsoever to the United States on account of its business in the fiscal year ended November 30, 1943, is in violation of the rights guaranteed to it by the Constitution of the United States of America, and is void

and without legal effect for the following and other reasons:

(1) The Renegotiation Act violates the provisions of Amendment V of the Constitution of the United States in that it deprives petitioner of its property without due process of law.

(2) The Renegotiation Act violates the provisions of Amendment V of the Constitution of the United States in that it provides for the taking of plaintiff's property without just compensation.

(3) The Renegotiation Act violates the provisions of Amendment X of the Constitution of the United States in that it provides for the exercise of power not granted to the United States.

(4) The Renegotiation Act violates Article I, Section 1, of the Constitution of the United States in that it unlawfully delegates legislative power.

(5) The Renegotiation Act violates Amendment VII of the Constitution of the United States in that it deprives the defendant of a jury trial in a controversy cognizable at common law, the value of which exceeds $20.

(6) The Renogotiation Act as applied to the petitioner is vague, uncertain and indefinite, in that it does not contain:

(a) Any objective standard, measurement or rule for the determination of excessive profits;

(b) Any description of or restriction upon the data, facts, factors or information to be considered in the determination of such alleged excessive profits.

(c) In that it does not make any provision for a hearing; and, in that the factors or standards appearing in Section 403(a)(4)(A) of the Renegotiation Act, or elsewhere in said Act, are indefinite, subjective, vague, and uncertain.

and in each of these respects the Renegotiation Act [fol. 267] is in violation of Article I, Section 1 and of Amendments V and X of the Constitution of the United States.

(7) Said Renegotiation Act provides for no judicial review of a determination made by the War Contracts

Price Adjustment Board or any individual acting for said Board, and, as such, violates Amendment V of the Constitution of the United States, in that The Tax Court of the United States is not a judicial body, but is a part of the executive branch of the Government.

(8) In so far as Sections 403(c)(2) and 403(e)(1) of the Renegotiation Act purport to authorize the Board to direct secretaries to eliminate excessive profits by directing contractors and subcontractors to withhold money due to the plaintiff and to authorize secretaries to direct contractors and subcontractors to withhold moneys due to the plaintiff for the account of the United States before The Tax Court of the United States has had an opportunity to make and has made a redetermination of such excessive profits upon the filing of an appropriate petition pursuant to Section 403(e)(1) of the Renegotiation Act, Section 403(c)(2) and 403(e)(1) of the Renegotiation Act are in violation of Amendment V of the Constitution of the United States.

(9) The Renegotiation Act violates Article III, Section 1 and Section 2 of the Constitution of the United States in that it authorizes the Executive branch of the Government of the United States to determine a controversy to which the United States is a party.

Section II

18. Continuously, since early in the year 1940 plaintiff has received numerous contracts and purchase orders for diesel fuel injection equipment, precision parts and aircraft precision parts from individuals, firms and corporations desiring such equipment or parts for their own account, or from persons, firms and corporations who in turn held contracts with others for the furnishing of such material. In carrying out its aforesaid contracts and filling said orders, plaintiff had maintained a high degree of adherence to its delivery schedules, and has delivered products of high precision and quality. Plaintiff is only one of numerous manufacturers of precision parts for aircraft and diesel fuel injection equipment and precision parts, and its contracts and orders have all been obtained on bids submitted in competition with other firms and corporations engaged

in the same business. Plaintiff is informed and believes, and therefore avers that its selling prices were among the lowest in the industry. Aside from certain Certificates of Necessity authorizing sixty months' amortization of certain of plaintiff's facilities, plaintiff's reductions of cost and consequent reductions in selling prices have been accomplished without financial aid or assistance from the United States of America.

[fol. 268] 19. In carrying out its contracts and filling the aforesaid orders since the early part of the year 1940, plaintiff has, at all times to the date hereof, cooperated with the United States with respect to making information available to other suppliers of similar products as to its manufacturing techniques and methods, in increasing its facilities at its own cost upon the request of the Navy Department, and in making numerous voluntary and substantial price reductions, permitted to be made as a result of improved manufacturing technique and operating experience. Plaintiff has no "cost-plus" contracts and assumed all the risks of its pricing policies. Plaintiff is informed and believes, and therefore avers that by comparison with others who manufactured the same precision parts for plaintiff's customer, plaintiff's prices were lower, its percentage of rejections was smaller and its performance of delivery schedules was most satisfactory to said customers; that plaintiff's low cost of manufacture was due to continuous and careful administrative supervision and planning, shop efficiency, prewar engineering and planning, and continuous, uninterrupted operations.

20. During the latter part of February, 1944, the Chicago Office of the War Contracts Price Adjustment Board began proceedings under the purported authority of the Renegotiation Act to renegotiate plaintiff's profits upon contracts and purchase orders with individuals, firms and corporations purchasing plaintiff's products, during the fiscal year ended November 30, 1943. In such proceeding, said Chicago Office purported to act for the War Contracts Price Adjustment Board. From time to time thereafter, in conference and by mail, plaintiff supplied details and statistical data with reference to its operations in said fiscal year. In the submission to such data and information plaintiff asserted and still asserts that of its total sales of $3,548,-

845.50, only $2,207,574.95, in any event, were subject to renegotiation; that $1,312,250.07 of its total sales were of "Standard Commercial Articles" as defined in the Renegotiation Act; were articles sold under competitive conditions affecting the sale thereof in a manner which reasonably protected the Government against excessive prices, and, as such, were not subject to renegotiation; that $29,020.48 of its total sales were not sold for the ultimate use of the United States of America or any department, agency or instrumentality thereof, but were made and sold for civilian use, and, as such, were not subject to renegotiation. Plaintiff filed with the Board a Petition for Certificate of Exemption for Standard Commercial Articles and furnished the Chicago Office of the Board a copy thereof. It advised the Chicago Office of the Board that said sales referred to in said petition were of the character referred to and ex-[fol. 269] empted by Section 403(a)(7) and 403(i)(4)(D) of the Renegotiation Act; and that these sales were of articles which have been sold by the plaintiff for years in a competitive market at fixed prices, which prices were the prices at which the plaintiff had sold such articles during its fiscal year 1943. After a purported consideration of the information and data submitted by the plaintiff in and in connection with its Petition for "Certificate of Exemption of Standard Commercial Articles", as filed by plaintiff with the Board, the Board declined and refused to issue a Certificate of Exemption on the sales of "Standard Commercial Articles" as requested by the plaintiff, notwithstanding the fact that the sales were made under conditions and in a manner that would fully protect the United States against excessive prices, according to the commonly accepted and honored definition or connotation of the term "excessive prices", (if that term is susceptible of definition). Notwithstanding all these facts as related above, the Board, arbitrarily, capriciously and unlawfully denied plaintiff's "Petition for Exemption of Standard Commercial Articles" and arbitrarily, capriciously and unlawfully determined that all sales of the plaintiff were subject to renegotiation, including sales of "Standard Commercial Articles" as defined in the Renegotiation Act. Plaintiff was also informed by representatives of the Chicago Office of the Board that it had disallowed, as part of the plaintiff's costs on renegotiable sales, the sum of $145,000, representing a part of the compensation paid plaintiff's officers in

the sum of $125,000 (which compensation so paid was paid under contracts which were executed prior to the enactment of the Sixth Supplemental National Defense Appropriation Act of 1942, and which, in so far as plaintiff's fiscal year 1943 is concerned, were performed both by the plaintiff and its officers prior to the enactment of the Renegotiation Act); and the sum of $17,000 as bad debts, $1,000 of an amortization charge and $2,000 charged as a loss on the sale of capital assets. The determination of the Chicago Office and of the Board in rejecting these items of costs as aforesaid and the inclusion in its base for the determination of excessive profits, the item of $1,312,250.07, representing sales of Standard Commercial Articles was protested by the plaintiff to the Chicago Office of the Board and to the Board, but notwithstanding such protest, the plaintiff is informed and believes such items were considered by the Board in the same manner as they were considered by the Chicago Office of the Board. In the fiscal year ending November 30, 1943, plaintiff used the same pricing methods which it has used since 1940 and has adhered to all the rules, regulations and methods of establishing prices prescribed by the Office of Price Administration and of all applicable laws of the United States of America.

[fol. 270] 21. Plaintiff further alleges that even if said Renegotiation Act or any part thereof be declared to be a proper exercise of the powers granted Congress by the Constitution, and to be constitutional in other respects, the acts and doings of the defendants in the application of said Act to the plaintiff's business for the year ending November 30, 1943, are illegal, arbitrary and capricious in each of the following respects:

(A) In the determination of alleged excessive profits realized, the defendants have erroneously and illegally included as subject to renegotiation, sales of "Standard Commercial Articles" as defined by Sections (a)(7)(A, B, C) and 403(c)(4)(D) made by petitioner in the aggregate amount of $1,312,250.07.

(B) In the determination of alleged excessive profits realized, there has been eliminated from the plaintiff's cost of sales, the sum of $145,000.00 as alleged in paragraph 21 hereof, all of which said items were proper items of plaintiff's costs.

(C) In the determination of alleged excessive profits realized, no proper credit or consideration has been given to the following factors:

(1) Efficiency of the petitioner with particular regard to attainment of quantity and quality production, reduction of costs, and economy in the use of materials, facilities and manpower;

(2) Reasonableness of petitioners' costs and profits, with particular regard to volume of production, normal prewar earnings, and comparison of war and peacetime products;

(3) Amount and source of public and private capital employed by petitioner and its net worth;

(4) Extent of risk assumed by petitioner, including the risk incident to reasonable pricing policies;

(5) Nature and extent of petitioner's contribution to the war effort, including inventive and developmental contribution and cooperation with the Government and other contractors in supplying technical assistance;

(6) Character of petitioner's business, including complexity of manufacturing technique, character and extent of subcontracting, and rate of turnover.

(D) In the determination of alleged excessive profits, plaintiff believes the War Contracts Price Adjustment Board took into consideration plaintiff's operation for the years 1938 and 1939, notwithstanding plaintiff in those years made no profits but was engaged in experimentation and development which, to a large measure, contributed to its ability to perform profitable work and which has greatly contributed to the war effort; that the defendants through their duly authorized subordinates were advised of these perti- [fol. 271] nent facts and ignored them in making their determination of the so-called excessive profits alleged by them to have been made by plaintiff for the fiscal year ending November 30, 1943.

(E) In the determination of the alleged excessive profits, petitioner's earnings have been reduced below its normal pre-war earnings as is shown by the schedule marked "Exhibit G" attached to this complaint and by this reference made a part of it.

(F) In determining alleged excessive profits no proper consideration was given to the facts made known to the War Contracts Price Adjustment Board, through its designated or delegated representatives, that prior to the year 1937, plaintiff did very little production work except for one customer and that in the year 1937 it lost that customer, and was, thereby, relegated to experimental and developmental work in the field of fuel injection devices for the betterment of diesel equipment; that, accordingly, its profits during the years 1938 and 1939, generally used by the War Contracts Price Adjustment Board, through its designated or delegated representatives as a base for comparison of pre-war profits with profits during the years renegotiated is not representative of its normal profits and when so used as a guide reflects unfavorably and unfairly to the plaintiff in the determination of its alleged excessive profits.

(G) In the determination of alleged excessive profits, no proper consideration was given to plaintiff's claim for relief under Section 722 of the Internal Revenue Code, and plaintiff alleges that the fiscal years 1938 and 1939 and the early part of 1940, through no fault of its own and due to extraordinary and unusual conditions (the loss of its single customer due to a change in customer's machines) was forced to convert its business into other lines and sustained substantial operating losses which reduced substantially its average income for said base years. Plaintiff avers that it heretofore filed and now has pending before the Commissioner of Internal Revenue a petition for relief under Section 722 of the Internal Revenue Code which it is believed by plaintiff will result in the reconstruction and substantial increase in plaintiff's average earnings credit for purposes of the Federal Excess Profit Tax; that if the defendant Henry L. Stimson or his delegates, acting at the direction of the War Contracts Price Adjustment Board, proceeds to eliminate the alleged excessive profits of $1,265,000.00 for the year ended November 30, 1943, by directing plaintiff's contractors to withhold sums due plaintiff, and to pay the same into the Treasury of the United States, as he or they propose and threaten to do, such action will operate in practical effect to set off and to nullify to a

large degree the remedy afforded plaintiff by Section 722 of the Internal Revenue Code, as well as the remedy provided by said Renegotiation Act whereby plaintiff may petition The Tax Court of the United States for [fol. 272] a redetermination of the amount, if any, by which its profits were excessive for the fiscal year 1943.

In the determination of alleged excessive profits realized by Plaintiff during the fiscal year ended November 30, 1943, which determination purports to be made under the Renegotiation Act passed February 25, 1944, the War Contracts Price Adjustment Board included all sales made by Plaintiff during the fiscal year ended November 30, 1943 and included therein not only the profits derived from contracts made by Plaintiff with its customers prior to the enactment of the Renegotiation Act, dated February 25, 1944, but also included therein profits derived from contracts made by Plaintiff with its customers prior to April 28, 1942, the date of the enactment of the Sixth Supplemental National Defense Appropriation Act of 1942.

Allegations Applicable to Both Sections I and II.

22. Plaintiff alleges that during the fiscal year ended November 30, 1943, of its total shipments in the amount of $3,548,845.50, over 80% of the dollar value of its shipments were made to Fairchild Engine and Airplane Corporation (Ranger Division), referred to as "Ranger", General Motors Corporation (Buick Motors Division, Chevrolet Division and Allison Division), Woodward Governor Company, and the United States Navy; that the shipments to said purchasers during the fiscal year ended November 30, 1943 were upon contracts made between the plaintiff and said purchasers prior to April 28, 1942, the date of the enactment of the Sixth Supplemental National Defense Appropriation Act of 1942, as is more fully shown by the affidavits of B. Ch. Kelleher which are filed herewith and made a part hereof.

23. Plaintiff alleges that said contracts and the shipments made thereunder described in the foregoing Paragraph (22) are not subject to the provisions of Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942, enacted April 28, 1942, relating to renegotiation, nor to the Renegotiation Act enacted February 25,

1944; that the aggregate of the shipments made by plaintiff in the fiscal year ended November 30, 1943 to the purchasers named in Paragraph (22) aforesaid under contracts made prior to April 28, 1942, between the plaintiff and said purchasers, was $2,780,009.82; and that said shipments are not subject to renegotiation under the provisions of Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942 or the Renegotiation Act.

24. Plaintiff further alleges that Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942 and the amendments thereto made during the year 1942, neither subjected nor purported to subject the contracts [fol. 273] described in Paragraph (22) above or the shipments of $2,780,009.82 made thereon, described in Paragraph (23) above, to renegotiation, and if said Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942 and the amendments thereto subjected or purported to subject said contracts and shipments described in Paragraph (22) to renegotiation, said Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942 and the amendments thereto so construed, as applied to plaintiff in regard to said shipments, would be unconstitutional and void and repugnant to the provisions of Amendment V of the Constitution of the United States.

25. Plaintiff further alleges that the Renegotiation Act enacted February 25, 1944 did not subject or purport to subject the contracts or shipments described in Paragraph (22) above to renegotiation, and said Renegotiation Act, enacted February 25, 1944, if construed as subjecting said contracts and shipments described in Paragraph (22) aforesaid to renegotiation, would be unconstitutional and void and repugnant to the provisions of Amendment V of the Constitution of the United States.

26. Plaintiff further alleges that in the performance of its said contracts with the purchasers named in Paragraph (22) hereof, it received from time to time, both prior and subsequent to April 28, 1942, shipping instructions in the form of "purchase orders" and shipping schedules in such form as was used by the respective purchasers aforesaid, designating their immediate requirements; that of the total shipments made by plaintiff during the fiscal year ended November 30, 1943, $175,423.71 of said shipments were

made upon such shipping instructions or so-called purchase orders received by plaintiff prior to April 28, 1942, and $2,604,586.11 of such shipments were made upon such shipping instructions or so-called purchase orders received by plaintiff after April 28, 1942.

27. Plaintiff further alleges that all of said shipments in the sum of $175,423.71, made upon "purchase orders" received by the plaintiff prior to April 28, 1942, are not subject to renegotiation under the provisions of Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942, and said Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942, if construed as subjecting said sales in the amount of $175,423.71 as described in Paragraph (26) hereof to renegotiation, would be unconstitutional and void, and repugnant to the provisions of Amendment V of the Constitution of the United States.

28. Plaintiff further alleges that said Renegotiation Act enacted February 25, 1944, neither subjected nor purported [fol. 274] to subject the shipments made on purchase orders dated prior to April 28, 1942, described in Paragraph (26) above, to renegotiation; and said Renegotiation Act enacted February 25, 1944, if construed as subjecting said shipments made on purchase orders dated prior to April 28, 1942, described in Paragraph (26) above, to renegotiation under the Renegotiation Act, would be unconstitutional and void and repugnant to the provisions of Amendment V of the Constitution of the United States.

29. Plaintiff further alleges that during the year 1942 the several divisions of General Motors Corporation forwarded to plaintiff agreements regarding renegotiation, pursuant to and in accordance with the provisions of Section 403 of the Sixth Supplemental Defense Appropriation Act of 1942, as amended, as is more fully set forth in the affidavits of B. Ch. Kelleher filed herein and by reference made a part hereof. Plaintiff also alleges that thereafter plaintiff executed said agreements with Allison Division, Chevrolet Division and Buick Division, and that the true intent and purpose of said agreements and each of them is that the plaintiff will be subject to renegotiation only if said Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942 should be determined to be constitutional

and valid, and then only if said Section 403 be applicable to the contracts of the plaintiff made subsequent to its enactment, and not to contracts made prior thereto. Plaintiff further alleges that Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942 is unconstitutional and invalid by reason of repugnancy to Article I and Article III of the Constitution of the United States and the Amendments V, VII and X thereto, for the reasons assigned in this complaint in respect of the unconstitutionality of the Renegotiation Act. Plaintiff further alleges that each of said agreements aforesaid was made and entered into by the plaintiff without any consideration, in so far as it be construed as applicable to contracts made and entered into prior to the date thereof, and that each of said agreements is, so construed, of no force and effect. Plaintiff alleges that no proceedings have been taken to renegotiate under any contract or contracts with any individual purchaser in accordance with the terms and provisions of said agreements, and that said agreements did not authorize or purport to authorize renegotiation under the Renegotiation Act, nor were any proceedings taken to renegotiate any of the profits derived by the plaintiff in its fiscal year ended November 30, 1943, under the terms and provisions of Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942 as amended.

[fol. 275] 30. Plaintiff further alleges that except as set forth in Paragraph (29) above, and except as a provision for adjustment of prices or renegotiation of profits appears in its said supplemental contract with the United States Navy, plaintiff made no agreements for renegotiation of its prices or profits on contracts or shipments made in the year 1943, and consented to no change, modification or alteration of its contracts; that no renegotiation of its profits or prices under the Navy contract, as such, has been had.

31. Plaintiff further alleges that it made and entered into no agreement with purchasers of its products, that its said contracts or shipments made in the fiscal year ended November 30, 1943 would be subject to renegotiation pursuant to the terms and provisions of the Renegotiation Act enacted February 25, 1944.

32. Plaintiff further alleges that the enactment of Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942, whether or not said Act be con-

stitutional or unconstitutional, could not subject plaintiff's contracts and shipments made in the year 1943 to the provisions of the Renegotiation Act enacted February 25, 1944.

33. Plaintiff further alleges that in respect of work performed for Ranger in plaintiff's fiscal year ended November 30, 1942, not less than $93,000 was sold upon orders or shipping instructions showing the same to be a part of Lend-Lease, and that in the fiscal year of the plaintiff ended November 30, 1943, not less than $210,000 was sold upon orders or shipping instructions showing the same to be a part of the Lend-Lease program. Plaintiff believes that of the products of plaintiff so shipped to Ranger, none were shipped pursuant to any contract with any Department of the United States of America, as defined in Section 403 of the Sixth Supplemental National Defense Appropriation Act. Plaintiff also believes that much of the other products manufactured by plaintiff as a subcontractor and furnished to contractors or other subcontractors were not made or delivered to contractors who furnished products, of which plaintiff's products were a part, under any contract with any Department of the United States of America, as defined in Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942 as amended, or the Renegotiation Act. Plaintiff alleges that information in respect of who was the ultimate purchaser of its products which it furnished to Ranger under the Lend-Lease program, and others of its customers, if any, to whom it sold its products and who may have sold under the Lend-Lease program, is not available to the plaintiff, but such information is available to one or more of the defendants. Plaintiff [fol. 276] prays that each and every defendant be required to make a true and correct statement in his answer to this complaint as to whether such products as plaintiff made for Ranger and others of its customers during its fiscal years ended November 30, 1942 and November 30, 1943, respectively, were made pursuant to contracts with any Department of the United States of America, as defined in Section 403 of the Sixth Supplemental National Defense Appropria Act of 1942 as amended, or the Renegotiation Act.

34. Plaintiff further alleges that notwithstanding the contracts dated prior to April 28, 1942, and the shipments made by plaintiff upon such contracts as aforesaid, Robert P. Patterson, Undersecretary of War, as the delegate of the

War Contracts Price Adjustment Board, conducted the purported renegotiation proceedings for the fiscal year ended November 30, 1943, as if the plaintiff's profits had been derived from contracts subject to the provisions of the Renegotiation Act (February 25, 1944) and in and by his "Order Determining Excessive Profits" for the fiscal year ended November 30, 1943 (dated January 11, 1945), said Robert P. Patterson determined that $1,265,000 of the profits of the plaintiff, before taxes, was excessive profits upon sales of $3,548,845.50 alleged to be subject to renegotiation under the Renegotiation Act (February 25, 1944), whereas, even if said Renegotiation Act be constitutional and be applicable to plaintiff's sales made in the fiscal year ended November 30, 1943 (and plaintiff alleges the contrary to both propositions), there should have been excluded from the shipments made by plaintiff in the fiscal year ended November 30, 1943 such amount as represented contracts of the plaintiff made prior to April 28, 1942, and such further amounts on contracts made after April 28, 1942, as represented shipments made to contractors not having contracts with any Department of the United States of America as defined in the Renegotiation Act enacted February 25, 1944.

35. Plaintiff alleges that during the fiscal year ended November 30, 1942, of its total shipments in the amount of $2,706,477.33, approximately 80% of the dollar value of its shipments were made to Fairchild Engine and Airplant Corporation (Ranger Division), General Motors Corporation (Buick Motors Division, Chevrolet Division and Allison Division), Woodward Governor Company, and the United States Navy; that the shipments to such purchasers during the fiscal year ended November 30, 1942, were upon contracts made between the plaintiff and said purchasers prior to April 28, 1942, the date of the enactment of the Sixth Supplemental National Defense Appropriation Act of 1942, as is more fully shown by the affidavits of B. Ch. [fol. 277] Kelleher which are filed herewith and made a part hereof.

36. Plaintiff alleges that said contracts and the shipments made thereunder described in the foregoing Paragraph (35) are not subject to the provisions of Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942, enacted April 28, 1942, relating to renegotia-

tion; that the aggregate of the shipments made by plaintiff in the fiscal year ended November 30, 1942 to the purchasers named in Paragraph (35) aforesaid under contracts made prior to April 28, 1942, between the plaintiff and said purchasers, was $1,886,770.11; and that said shipments are not subject to renegotiation under the provisions of Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942.

37. Plaintiff further alleges that Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942 and the amendments thereto made during the year 1942 neither subjected nor purported to subject the contracts described in Paragraph (35) above or the shipments of $1,886,770.11 made thereon, described in Paragraph (36) above, to renegotiation, and if said Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942 and the amendments thereto subjected or purported to subject said contracts and shipments described in Paragraph (35) to renegotiation, and Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942 and the amendments thereto, so construed, as applied to plaintiff in regard to said shipments, would be unconstitutional and void and repugnant to the provisions of Amendment V of the Constitution of the United States.

38. Plaintiff further alleges that in the performance of its said contracts with the purchasers named in Paragraph (35) hereof, and in the performance of its undertakings with General Motors Corporation, Packard Electric Division; Studebaker Corporation, and Hudson Motor Car Corporation, it received from time to time, shipping instructions in the form of purchase orders and shipping schedules in such form as was used by the respective purchasers aforesaid, designating their immediate requirements; that of the total shipments of $2,706,477.33 made by plaintiff during the fiscal year ended November 30, 1943, $1,625,023.65 of said shipments were made upon such shipping instructions or so-called purchase orders received by plaintiff prior to April 28, 1942, and $675,823.10 of such shipments were made upon such shipping instructions or so-called purchase orders received by plaintiff after April 28, 1942.

39. Plaintiff further alleges that all of said shipments in the sum of $1,625,023.65 made upon purchase orders re- [fol. 278] ceived by the plaintiff prior to April 28, 1942, are not subject to renegotiation under the provisions of Sec-

tion 403 of the Sixth Supplemental National Defense Appropriation Act of 1942, and if said Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942 were construed as subjecting said sales in the amount of $1,625,023.65, as described in Paragraph (38) hereof, to renegotiation, such Section 403, so construed, would be unconstitutional and void and repugnant to the provisions of Amendment V of the Constitution of the United States.

40. Plaintiff further alleges that during the year 1942 the several divisions of General Motors Corporation forwarded to plaintiff agreements regarding renegotiation, pursuant to and in accordance with the provisions of Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942, as is more fully set forth in the affidavits of B. Ch. Kelleher filed herein and by reference made a part hereof. Plaintiff also alleges that thereafter plaintiff executed said agreements with Allison Division, Chevrolet Division and Buick Division, and plaintiff alleges that the true intent and purpose of said agreements and each of them is that the plaintiff will be subject to renegotiation only if said Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942 should be determined to be constitutional and valid, and then only if said Section 403 be applicable to the contracts of the plaintiff made subsequent to its enactment, and not to contracts made prior thereto. Plaintiff further alleges that Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942 is unconstitutional and invalid by reason of repugnancy to Article I and Article III of the Constitution of the United States and the Amendments V, VII and X thereto, for the reasons assigned in this complaint in respect of the unconstitutionality of the Renegotiation Act. Plaintiff further alleges that each of said agreements aforesaid were made and entered into by the plaintiff without any consideration; that each of said agreements is of no force and effect; and that no proceedings have been taken to renegotiate under any contract or contracts with any individual purchaser in accordance with the terms and provisions of said agreements, and that said agreements did not authorize or purport to authorize renegotiation under the Renegotiation Act, nor were any proceedings taken to renegotiate any of the profits derived by the plaintiff in its fiscal year ended November 30, 1942

under the terms and provisions of Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942.

41. Plaintiff further alleges that except as set forth in Paragraph (40) above, and except as a provision for ad- [fol. 279] justment of prices or renegotiation of profits may be contained in its said contract with the United States Navy, dated August 17, 1941, plaintiff made no agreements for renegotiation of its prices or profits on contracts or shipments made in the year 1942, and consented to no change, modification or alteration of its contracts.

42. Plaintiff further alleges that notwithstanding the contracts dated prior to April 28, 1942, and the shipments made by plaintiff upon such contracts, as aforesaid, Robert P. Patterson, Undersecretary of War, as the delegate of Henry L. Stimson, Secretary of War, conducted the purported renegotiation proceedings for the fiscal year ended November 30, 1942, as if all the plaintiff's profits (except a minor and trivial portion thereof which pertained to sales to the civilian trade) had been derived from contracts subject to the provisions of the Sixth Supplemental National Defense Appropriation Act of 1942, as amended, and in and by his "Unilateral Determination of Excessive Profits" for the fiscal year ended November 30, 1942, dated October 27, 1943, said Robert P. Patterson determined that $775,000.00 of the profits of the plaintiff, before taxes, was excessive profits upon sales of $2,446,000 assumed by defendant Patterson to be subject to renegotiation under the Sixth Supplemental National Defense Appropriation Act of 1942, as amended; whereas, even if said Sixth Supplemental National Defense Appropriation Act of 1942, as amended, be constitutional and be applicable to some of plaintiff's sales made in the fiscal year ended November 30, 1942 (and plaintiff alleges the contrary of both propositions), there should have been excluded from the sales made by plaintiff in the fiscal year ended November 30, 1942, such amount as represented contracts of the plaintiff made prior to April 28, 1942, and such further amounts on contracts made after April 28, 1942 as represented sales made to contractors not having contracts with any Department of the United States of America as defined in the Sixth Supplemental National Defense Appropriation Act of 1942, as amended.

43. Plaintiff alleges that notwithstanding the unconstitutionality of the Renegotiation Act, its illegal and improper administration in respect of plaintiff's business for

the year ended November 30, 1943, and the fact that plaintiff is in good faith prosecuting its petition for Redetermination in The Tax Court of the United States, the defendants herein who constitute the War Contracts Price Adjustment Board have threatened to institute proceedings to order the several customers of the plaintiff to withhold moneys otherwise due to the plaintiff for the account of the United States of Amer- and the defendant, Henry L. Stim-
[fol. 280] son or his delegates, have threatened to, and will, unless restrained by order of this Court, do as they did in the prior year, while said prior petition for redetermination was pending, order the several customers of the plaintiff, other than the United States Government or any agency or instrumentality thereof, to (a) withhold payments due to the plaintiff and (b) to pay the amount now demanded, $1,265,000.00 less tax adjustments into the Treasury of the United States, and thus deprive the plaintiff of any benefit which it may obtain by a determination of The Tax Court of the United States. While, as alleged herein, plaintiff has filed in The Tax Court of the United States, its petition for a redetermination of the amount of excessive profits, if any, due from the plaintiff to the United States of America, for its fiscal year ending November 30, 1943, in and by which petition the plaintiff raises the question of the constitutionality of the Renegotiation Act, the right, power and jurisdiction of The Tax Court of the United States to pass on the constitutionality of the Renegotiation Act, is open to substantial doubt and there is further substantial doubt as to whether The Tax Court of the United States would exercise that right, power and jurisdiction if The Tax Court of the United States has such right, power and jurisdiction. Accordingly the right accorded the plaintiff, by the Renegotiation Act, to file a petition for a redetermination of the amount due as aforesaid is and will be, insofar as the question of constitutionality of the Act is concerned, a barren one and would serve no useful purpose; and, in addition, said Act contains no provision in respect to repayment to the plaintiff of the difference between any lesser amount The Tax Court of the United States shall determine to be due as excessive profits and the amount the Board has determined to be due as excessive profits or the repayment of interest on such amounts as shall have been paid.

44. Unless relief be accorded as herein prayed, plaintiff will suffer irreparable injury in that the withholding from plaintiff of sums due to plaintiff from its customers (not including the United States of America or any agency or instrumentality thereof), or the payment thereof into the Treasury of the United States will:

(A) Compel plaintiff unnecessarily to run the risk of subsequent impaired credit or insolvency of such of the contractors, customers of the plaintiff, as may be directed to withhold money due plaintiff.

(B) Impair plaintiff's working capital essential to the carrying out of its contracts and its subcontracts with contractors. If defendant Henry L. Stimson or his delegates direct the withholding of or the payment into the Treasury of the United States of $1,265,000.00 less tax adjustments, as he or they will unless re- [fol. 281] strained by the Court, plaintiff's operations will be hampered and its business irreparably damaged by the reduction of its working capital.

(C) Force plaintiff to select one or two courses of conduct with respect to continuing shipments to withholding customers, either of which will be irreparably injurious to plaintiff. If plaintiff shall continue to supply products to such customers as have been directed to withhold, plaintiff will impair its assets and the interests of the holders of its capital stock. If it shall refuse to make such shipments, plaintiff will be unable to continue in business, inasmuch as a substantial portion of its market for its products presently is prime contractors with the United States and subcontractors thereof. The termination of plaintiff's business would also substantially injure and impair the war effort inasmuch as the products manufactured by plaintiff are of great essentiality in the production of material essential to the conduct of the war.

(D) Force plaintiff to sue its customers for sums withheld with resultant ill-feeling and irreparable injury to the good-will now existing between plaintiff and its customers and to plaintiff's business with them.

45. Plaintiff is without a plain, adequate and complete remedy at law with respect to the unconstitutional Renegotiation Act and the unauthorized exercise thereunder of power by the defendants herein, inasmuch as:

(A) The legal effect of the threatened and proposed withholding order, or the threatened and proposed order directing payment into the Treasury of the United States, amounts to the illegal seizure of plaintiff's property and leaves plaintiff without adequate legal remedy to recover the same.

(B) The administrative remedy by petition for redetermination in The Tax Court of the United States is wholly inadequate and ineffectual if, as was done by the defendant Robert P. Patterson as a delegate of Henry L. Stimson, following the determination of the amount of plaintiff's profits alleged to have been excessive profits with respect to the fiscal year ended November 30, 1942, and as is now threatened by the defendants with respect to the determination made January 11, 1945 (Exhibit "A"), during the pendancy of said proceedings in The Tax Court of the United States, or thereafter and irrespective of the result thereof, plaintiff's moneys are seized and appropriated without legal remedy to recover the same.

(C) In suit against the United States for sums of money withheld under orders of the defendants, or paid into the Treasury of the United States, the remedy would be neither plain nor adequate because inter alia: (1) the case might be held not within the jurisdiction of the Court of Claims based on tort or contract; and (2) plaintiff could not recover interest for the use of its money.

[fol. 282] (D) Actions against each of the several contractors or subcontractors to recover the sums of money due the plaintiff which the defendants, Stimson or Patterson, or their delegates or subordinates, may direct such contractors or subcontractors to withhold, would require a number of suits at law and in different jurisdictions. Such multiplicity of suits would be costly and vexatious. They would impose on plaintiff and on plaintiff's customers the burden of litigating questions of constitutional law of great public importance. In each such suit, because defendant's determination and order of January 11, 1945 (Exhibit "A") was not a refixing of prices on individual contracts and purchase orders but was the demand of a lump sum portion of plaintiff's entire business in the fiscal year ended November 30, 1943, plaintiff would be subjected

to the insurmountable and impossible requirement of establishing which of its contracts or sub-contracts or purchase orders, if any, were subject to renegotiation and to what extent.

(E) The plaintiff's recovery would be offset, in part at least, by the inevitable loss incident to the termination of business, or loss of good will resulting from such suit against its customers. The value to plaintiff of a subsequent redetermination by The Tax Court of the United States that there existed no excessive profits for the fiscal year 1943 or that the amount thereof was less than that determined by the War Contracts Price Adjustment Board would be offset, in part at least, by the great damage which would be sustained by plaintiff through the loss of good will resulting through termination of business with contractors, its customers, whether brought about by the impairment of plaintiff's working capital or a decision forced upon it to cease filling orders for customers withholding moneys due to plaintiff, or as a result of ill will created through the bringing of suits against such customers.

Wherefore, the plaintiff prays:

(A) That this Court issue forthwith its temporary restraining order against the defendants and each of them, their agents, delegates, assistants, deputies, employees and all other persons acting under their direction or supervision, enjoining and restraining each and all of said persons from:

(1) Directing, instructing or requesting any contractor or subcontractor, or officer, employee or agent thereof, to withhold any moneys due or to become due to plaintiff from any contractor or subcontractor;

(2) From further proceeding in any manner to renegotiate or redetermine contract prices with respect to materials and supplies furnished by plaintiff to any contractor or subcontractor; and

(3) From proceeding in any manner directly or indirectly to enforce or attempt to enforce the determination and order of the War Contracts Price Ad- [fol. 283] justment Board of January 11, 1945 (Exhibit "A", attached to this Complaint) which became operative as of May 3, 1945, or any later

order of the War Contract Price Adjustment Board, or the defendants or either of them, or their delegates, until hearing or determination on the application for an interlocutory injunction.

(B) That upon presentation of the Complaint to a judge of this Court, such judge request the Senior Circuit Judge, or in his absence, the presiding Circuit Judge in which this District Court is located, to designate two other Judges from such circuit to constitute a court under the provisions of Section 380a, Title 28 U.S.C. for the purpose of granting the relief prayed for in designated paragraph C of this prayer for relief.

(C) (1) Upon hearing in respect of whether an interlocutory injunction should be granted, to continue in force until such time as the Court shall determine, the temporary restraining order, which shall have been issued upon the filing of this Complaint and hearing by the judge of this Court.

(2) To grant an interlocutory injunction against the defendants and each of them, their or either of their agents, delegates, assistants, deputies, employees and all other persons acting under their direction or supervision enjoining each and all of said persons from:

(a) Directing, instructing or requesting any contractor or subcontractor or officer, employee or agent thereof, to withhold any moneys due or to become due to plaintiff from any contractor or subcontractor;

(b) Further proceeding in any manner to renegotiate or redetermine contract prices with respect to materials and supplies furnished by plaintiff to any contractor or subcontractor; and

(c) Proceeding in any manner directly or indirectly to enforce or attempt to enforce the determination and order of the War Contracts Price Adjustment Board (Exhibit "A" attached to this Complaint) of January 11, 1945, which became operative as of May 3, 1945, or any later order of the defendants or either of them or their delegates, until hearing or determination of the prayer of the Complaint for a permanent injunction.

(3) Upon final hearing to enter a decree:

(a) Declaring the Renegotiation Act of 1943 un-

constitutional, null and void on the ground that it is repugnant to the Constitution of the United States in that:

(i) It is beyond the powers expressly or im- [fol. 284] pliedly granted to the Government of the United States, or

(ii) It is violative of Amendment V of the Constitution of the United States because it authorizes the taking of property without due process of law, or

(iii) It is violative of Article I, Section 1 of the Constitution of the United States in that it delegates legislative power to others than the Congress of the United States, or

(iv) It is violative of Amendment X of the Constitution of the United States, or

(v) It is violative of Amendment VII of the Constitution of the United States, or

(vi) That it is violative of any combination of grounds mentioned in (i), (ii), (iii), (iv) and (v) above; and

(b) Granting an injunction enjoining the defendants, and each of them, their agents, delegates, assistants, deputies, employees and all persons acting under their direction or supervision from doing any act or thing, in respect of plaintiff or in any way affecting the plaintiff, its business or moneys due to it from anyone, especially contractors and subcontractors, its customers, to enforce, administer, operate under or to carry into execution any of the provisions of the Renegotiation Act, or any order of the War Contract Price Adjustment Board or its delegates in respect of excessive profits received by or accrued to the plaintiff for the fiscal year ended November 30, 1943, or in the alternative:

(4) Upon final hearing to enter a decree granting an injunction enjoining the defendants, their or either of their agents, delegates, deputies, employees or any other person or persons acting under their direction or supervision from eliminating or attempting to eliminate excessive profits of the plaintiff, as determined by the War Contracts Price Adjustment Board, or its delegates, by directing any contractor or subcontractor,

customers of the plaintiff, to withhold for the account of the United States or otherwise any moneys due to the plaintiff, or, directing any such contractor or subcontractors, customers of the plaintiff to pay any money into the Treasury of the United States or any other agency or instrumentality of the United States, which, as determined by the War Contracts Price Adjustment Board or its delegates or the defendants or either of them, are representative of excessive profits, or otherwise until such time as The Tax Court of the United States shall have made a final determination, under the provisions of the Renegotiation Act, of the amount of money, if any, due to the United States from [fol. 285] the plaintiff as excessive profits as defined in the Renegotiation Act, for its fiscal year ending November 30, 1943, or,

(D) If the Court constituted of three judges shall not have granted the relief prayed for in subparagraph (3) of Paragraph (C) of this prayer for relief, and, if, in the determination of the Court of three judges, it is without jurisdiction to grant the relief prayed for in subparagraph (4) of paragraph (C) of this prayer for relief, then, that such court of three judges refer or remand for hearing by the District Court of one judge for consideration in respect of whether such District Court of one judge shall grant the relief prayed for in subparagraph (4) of paragraph (C) of this prayer for relief.

(E) In the event the court of three judges shall determine that it will not grant the relief prayed for in subparagraph (3) of paragraph (C) of this prayer for relief and that it is without jurisdiction to grant the relief prayed for in subparagraph (4) of paragraph (C) of this prayer for relief, that the District Court of one judge enter a decree granting an injunction in accordance with the prayer embodied in subparagraph (4) of paragraph (C) of this prayer for relief.

(F) That upon final hearing the Court, pursuant to the provisions of the Federal Declaratory Judgment Act, declare and decree that the Renegotiation Act is unconstitutional, null and void, and unenforceable against plaintiff.

(G) For such other, different and further relief the Court of three judges or one judge, as the case may be, as in the premises, either such courts, within the sphere of its jurisdiction, may appropriately grant.

Gallagher, Rinaker, Wilkinson & Hall, By Richard Hall, 231 South La Salle Street, Chicago 4, Illinois, and Hill and Crenshaw, By Francis W. Hill, Woodward Building, Washington 5, D. C., Attorneys for Plaintiff.

Copy of Complaint and exhibits received this 2nd day of July, 1945.

Walter W. Lowry.

[fol. 286] *Duly sworn to by B. Ch. Kelleher. Jurat omitted in printing.*

[fol. 287] EXHIBIT A

War Department, Office of the Under Secretary
Washington

Order Under Delegated Authority Determining Excessive Profits

Pursuant to authority duly delegated by the War Contracts Price Adjustment Board, a renegotiation proceeding was duly commenced with Aircraft & Diesel Equipment Corporation (hereinafter called the 'Contractor') with respect to the aggregate of the amounts received or accrued by the Contractor under contracts with the Departments and subcontracts as defined in the Renegotiation Act (such contracts and subcontracts being hereinafter collectively referred to as 'said contracts with the Departments and subcontracts') for the Contractor's fiscal year ended 30 November 1943 (hereinafter called 'said fiscal year').

In connection with such renegotiation proceeding, a conference was held with the Contractor at or in connection with which there were submitted by the Contractor and obtained from governmental or other reliable sources, certain financial, operating and other data relating to the Contractor's business and the Contractor's profits derived from said contracts with the Department and subcontracts

during said fiscal year. At and in connection with such conference the Contractor has been afforded full opportunity to submit such additional information and to present such contentions as the Contractor deemed material to a determination of excessive profits within the meaning of the Renegotiation Act.

In determining the excessive profits hereinafter determined, due consideration has been given to all such financial, operating and other data and information so furnished or obtained, to each of the contentions so presented, and to all of the factors referred to in subsection (a)(4)(A) of the Renegotiation Act.

As a result of such renegotiation it is hereby determined that $1,265,000.00 represents the portion of the Contractor's profits derived from said contracts with the Departments and subcontracts for said fiscal year, which is excessive within the meaning of the Renegotiation Act. After proper adjustment on account of taxes, other than Federal taxes, measured by income which are attributable to that portion of the Contractor's profits derived from said contracts with the Departments and subcontracts for said fiscal year which is not excessive, it is hereby determined that [fol. 288] the amount of excessive profits of the Contractor for said fiscal year which should be eliminated is $1,265,000.00.

This order will be deemed the determination of the War Contracts Price Adjustment Board upon the conditions prescribed in subsection (d)(5) of the Renegotiation Act, then the Secretary of War (or such official or officials in the War Department to whom the power, function and duty of exercising such authority and carrying out such direction may be, or have been delegated or successively redelegated) is hereby authorized and directed to take such action (including the authorization and direction of any other Secretary or Secretaries to take such action) as is provided by the Renegotiation Act and as he deems appropriate to eliminate such excessive profits to be eliminated.

In connection with the payment or discharge by any means of such excessive profits to be eliminated, the Renegotiation Act provides that the Contractor shall be allowed the applicable credit, if any, for Federal income and excess profits taxes as provided in Section 2806 of the Internal Revenue Code.

Dated, Issued and Entered on 11 January 1945.

Robert P. Patterson (signed), Under Secretary of War, Acting on behalf of the War Contracts Price Adjustment Board created by the Renegotiation Act, under due delegations of authority made pursuant to subsection (d)(4) of the Renegotiation Act.

[fol. 289] EXHIBIT B

War Department, Office of the Under Secretary
Washington

Determination of Excessive Profits

Pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended.

Whereas, Aircraft & Diesel Equipment Company (hereinafter referred to as the Contractor), holds contracts and subcontracts subject to renegotiations pursuant to the provisions of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended (hereinafter referred to as the Act); and

Whereas, renegotiations has taken place between the Under Secretary of War and the Contractor, pursuant to the provisions of the Act, for the purpose of eliminating excessive profits realized by the Contractor during its Fiscal Year Ended November 30, 1942, under said contracts and subcontracts; and

Whereas, as a basis for said renegotiation the Under Secretary of War considered certain financial, operating and other data, submitted by the Contractor or obtained by the Under Secretary of War from governmental or other reliable sources, relating to the profits realized by the Contractor during said fiscal year under said contracts and subcontracts; and

Whereas, the Contractor has been granted full opportunity to submit such additional information and to present such contentions as the Contractor deemed material in determining the excessiveness of said profits and the renegotiabilities of such contracts and subcontracts, at hearings of which due notice was given, and due consideration

has been given to the financial, operating and other data and information so furnished or obtained and each of the contentions so presented;

Now, therefore, pursuant to the authority and discretion vested in the Secretary of War, the Secretary of the Navy, the Secretary of the Treasury, the Chairman of the Maritime Commission, the Administrator of the War Shipping Administration, and the respective Boards of Directors of the Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation and Rubber Reserve Company under the provisions of the Act, and duly delegated to the Under Secretary of War under subsection (f) hereof, it is hereby found and determined:

That $775,000 of the profits realized by the Contractor during its Fiscal Year Ended November 30, 1942, [fol. 290] under its contracts and subcontracts subject to renegotiation pursuant to the provisions of the Act, are excessive.

That in connection with the payment or discharge by any means of the amount of excessive profits determined hereby to have been realized by the Contractor, the Contractor shall be credited with any amount to which it may be entitled under Section 3806 of the Internal Revenue Code as computed by the Commissioner of Internal Revenue.

That the Contractor is directed to repay such excessive profits less such tax credit, if any, to the Treasurer of the United States.

That the excessive profits so found and determined shall be eliminated by any of the methods provided in the Act, or any combination thereof; and the Commanding General, Army Service Forces, and the Commanding General, Army Air Forces, are hereby authorized and directed to take any and all action which may be necessary or desirable to effect such elimination.

Robert P. Patterson, Under Secretary of War.

27 October, 1943.

[fol. 291] EXHIBIT C

War Department, Office of the Under Secretary
Washington, D. C.

Sprar

Mr. Francis W. Hill, Jr., Woodward Building,
Washington 5, D. C.

Subject: Renegotiation of Aircraft & Diesel Equipment Corporation for the Fiscal Year Ended 30 November 1942.

Dear Sir:

This will acknowledge your letter of 9 April 1945 in which you request that, as counsel for the above company, you be furnished with a statement of the 1942 determination, of the facts used as a basis therefor and of the reasons for such determination. Inasmuch as these renegotiation proceedings covered a fiscal year ended prior to 1 July 1943, the renegotiation comes under the Renegotiation Act of 1942, not under the Renegotiation Act of 1943. Consequently, there is no statutory requirement that the type of statement which you request be furnished to you and under these circumstances your request can not be granted.

It has consistently been the policy of the War Department not to furnish such statements in connection with the renegotiation of fiscal periods ending prior to 1 July 1943. This policy is based on the fact that, after full consideration in connection with the Revenue Act of 1943, the Congress determined not to require the furnishing of written statements in connection with the thousands of 1942 renegotiations. It was not believed reasonable to assume the administrative burden of attempting to apply retroactively the terms of the new act in this respect to the many cases completed in past periods and under conditions and requirements not clearly specified as in the present law.

For the Chairman:

(Signed) William C. Martens, Lt. Colonel, A.U.S.,
Chief, Renegotiation Branch

[fol. 292] EXHIBIT D

War Department, Office of the Under Secretary
Washington, D. C.

11 January 1945

Aircraft & Diesel Equipment Corporation, 4401 North Ravenswood Avenue, Chicago, Illinois.

Notice of Order Under Delegated Authority Determining Excessive Profits.

Gentlemen:

You are hereby notified by registered mail that pursuant to renegotiation under the Renegotiation Act, and in accordance with authority delegated by the War Contracts Price Adjustment Board, the undersigned acting in its behalf, issued and entered on the date of this letter, an order determining that of your profits derived from contracts with the Departments and subcontracts for your fiscal year ended 30 November 1943, $1,265,000.00 represent excessive profits which should be eliminated. A signed copy of such order is inclosed herewith.

As provided in the Renegotiation Act, such order may, in the discretion of the War Contracts Price Adjustment Board, be reviewed by such Board upon your request, or upon its own motion, but unless such review shall have been initiated within the time prescribed by the Renegotiation Act, such order shall be deemed the determination of the War Contracts Price Adjustment Board.

Very truly yours, (Signed) Robert P. Patterson,
Under Secretary of War, Acting on behalf of the War Contracts Price Adjustment Board created by the Renegotiation Act, under due delegations of authority made pursuant to subsection (d)(4) of the Renegotiation Act.

Inclosure Order

[fol. 293] EXHIBIT E

3 May 1945

Room 3D 573—The Pentagon, Aircraft & Diesel Equipment Corporation, 4401 North Ravenswood Avenue, Chicago, Illinois

Gentlemen:

You are hereby notified that, no review having been initiated by the War Contracts Price Adjustment Board, either on your request or on its own motion, of the order dated, issued and entered on 11 January 1945 pursuant to renegotiation under the Renegotiation Act, by Robert P. Patterson, Under Secretary of War, acting on behalf of the War Contracts Price Adjustment Board in accordance with authority delegated by it, determining that of your profits derived from contracts with the Departments and subcontracts for your fiscal year ended 30 November 1943, One Million, Two Hundred Sixty-five thousand Dollars $1,265,000) represents excessive profits which should be eliminated, such order is deemed the determination of the War Contracts Price Adjustment Board.

A copy of such order is enclosed herewith.

This notice is being mailed to you by Registered Mail on 3 May 1945.

According to the letter dated January 30, 1945, from the Internal Revenue Agent in Charge, the applicable tax credit, as provided in Section 3806 of the Internal Revenue Code, amounts to $994,235.28. Assuming the correctness of the basis upon which the computation of such tax credit was made, as set forth in the aforesaid letter, the balance due the Treasury of the United States is $270,764.72. Any check for this amount should be drawn to the order of the Treasurer of the United States and delivered to the Chairman, War Department Price Adjustment Board, Room 3D 573—The Pentagon, Washington 25, D. C.

Demand is hereby made for the payment of the amount of excessive profits to be eliminated less the applicable tax credit as provided in Section 3806 of the Internal Revenue Code. Interest will accrue at the rate of 6% per annum from and after 18 May 1945 on any amount due under and unpaid.

Very truly yours, War Contracts Price Adjustment Board, By (S.) J. S. Feight, Lieutenant, USNR, Secretary.

Countersigned: (S.) Maurice Hirsch, Col., General Staff Corps, Acting on behalf of the Secretary of War.

[fol. 294] EXHIBIT F

[fol. 295] Before The Tax Court of the United States

AIRCRAFT & DIESEL EQUIPMENT CORPORATION, a Corporation, Petitioner,

vs.

WAR CONTRACTS PRICE ADJUSTMENT BOARD, Respondent

Docket No. —

Petition for Redetermination under Renegotiation Act

1. Your petitioner, Aircraft & Diesel Equipment Corporation, a corporation, respectfully files this petition for redetermination, under the Renegotiation Act, of alleged excessive profits realized by it during the fiscal year commencing December 1, 1942 and ending November 30, 1943, and respectfully shows that:

I

Parties

2. A. Petitioner, Aircraft & Diesel Equipment Corporation, is a corporation organized November 30, 1936, under the laws of the State of Delaware. Since the date of its [fol. 296] incorporation petitioner has been authorized to do business in the State of Illinois as a foreign corporation and maintains its principal office and place of business in the City of Chicago in the State of Illinois. During the fiscal year beginning December 1, 1942 and ending November 30, 1943, and prior and subsequent thereto, it was engaged in the business of manufacturing and selling diesel fuel injection equipment and precision parts and aircraft precision parts.

3. B. Respondent, War Contracts Price Adjustment Board is an agency of the United States of America under the provisions of the Renegotiation Act, and as such is charged with the duty of administering:

(1) Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942 (Public Law 528, 77th Congress) approved April 28, 1942, as amended by

(2) Section 801 of the Revenue Act of 1942 (Public Law 752, 77th Congress) approved October 21, 1942, as amended by

(3) Section 1 of the Military Appropriation Act of 1944 (Public Law 108, 78th Congress) approved July 1, 1943, as further amended by

(4) Public Law 149, 78th Congress, approved July 14, 1943, and as further amended by

(5) Section 701 of the Revenue Act of 1943 (Public Law 235, 78th Congress) effective February 25, 1944, said Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942 and said amend-
[fol. 297] ments thereof being hereinafter referred to as the Renegotiation Act.

II

Jurisdiction of the Court

4. A. This petition is filed pursuant to the provisions of sub-section (c) (1) of Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942, as amended by the "Renegotiation Act."

5. B. Robert P. Patterson purporting to act as a delegate of, and on behalf of the War Contracts Price Adjustment Board, under purported delegation of authority, issued and entered on January 11, 1945, an order purporting to determine that of the profits realized by Aircraft & Diesel Equipment Corporation from contracts with the Departments and sub-contracts for the fiscal year ended November 30, 1943, One Million Two Hundred Sixty-five Thousand Dollars ($1,265,000.00) represented excessive profits which should be eliminated. A copy of said "Order Under Delegated Authority Determining Excessive Profits," dated, issued and entered on January 11, 1945, and a copy of a letter of Robert P. Patterson, dated January 11, 1945, to petitioner enclosing said order, are attached to this petition as Exhibits "A" and "B" respectively.

6. C. Under date of February 28, 1945 (acknowledged and received by the War Contracts Price Adjustment Board on March 3, 1945) (each of said dates being within 60 days [fol. 298] from January 11, 1945, the date of the "Order Under Delegated Authority Determing Excessive Profits," issued by Robert P. Patterson), Aircraft & Diesel Equipment Corporation filed with the War Contracts Price Adjustment Board and the said Robert P. Patterson, its request to said Board to initiate a review of such determination made by the said Robert P. Patterson, dated January 11, 1945, in accordance with the provisions of Section 403 (d) (5) of the Renegotiation Act.

7. On May 5, 1945, petitioner received a letter dated May 3, 1945, from the War Contracts Price Adjustment Board (a copy of which is attached hereto and made a part hereof marked Exhibit C). Enclosed with such letter (Exhibit C) was an order of the War Contracts Price Adjustment Board (a copy of which is attached hereto marked Exhibit D) together with a copy of the Order Under Delegated Authority Determining Excessive Profits, dated January 11, 1945, (a copy of which is attached hereto and marked Exhibit A). The Order and letter (Exhibits C & D) advise petitioner that its request to the War Contracts Price Adjustment Board to initiate a review of its previous determination, as embodied in the Order Under Delegated Authority Determining Excessive Profits, dated January 11, 1945, (Exhibit A) had been considered by the War Contracts Price Adjustment Board and that it had decided not to initiate such a review and that the Order Under Delegated Authority Determining Excessive Profits (Exhibit A) [fol. 299] had become and was the Order of the War Contracts Price Adpustment Board as of May 3, 1945, and for that the ninety day period for the filing of a petition for a redetermination in The Tax Court of the United States began to run May 3, 1945.

8. D. The said "Order Under Delegated Authority Determining Excessive Profits," dated January 11, 1945, (now the order of the War Contracts Price Adjustment Board dated May 3, 1945) was not approved or consented to by your petitioner, and was not embodied in any agreement between the Under Secretary of War, or the Secretary of War, or the War Contracts Price Adjustment Board, and petitioner, Aircraft & Diesel Equipment Corporation, as a

contractor or sub-contractor. No agreement has been made or entered into by and between the Under Secretary of War, or the Secretary of War, or the War Contracts Price Adjustment Board, and petitioner, Aircraft & Diesel Equipment Corporation, relative to a determination of alleged excessive profits realized by petitioner during the fiscal year commencing December 1, 1942 and ending November 30, 1943.

9. E. This petition is filed in the Tax Court of the United States pursuant to the provisions of Section 403 (e) (1) and is filed within 90 days after the date of and the mailing of the order of the War Contracts Price Adjustment Board dated May 3, 1945, "Exhibit D" determining not to initiate a review and adopting as the order of the Board, the previous "Order Under Delegated Authority Determining Ex-
[fol. 300] cessive Profits," "Exhibit A" made by the said Robert P. Patterson, Under Secretary of War, and purporting to act on behalf of the War Contracts Price Adjustment Board.

III

The amount of excessive profits determined by the War Contracts Price Adjustment Board.

10. A. In the "Order Under Delegated Authority Determining Excessive Profits," dated, issued and entered on January 11, 1945, made by the said Robert P. Patterson, Under Secretary of War, purporting to act on behalf of the War Contracts Price Adjustment Board, which becomes the order of the War Contracts Price Adjustment Board, dated May 3, 1945, the amount of alleged excessive profits of the petitioner is determined to be $1,265,000.00 during the fiscal year ended November 30, 1943.

11. B. Copies of the orders dated January 11, 1945, and May 3, 1945, are attached to this petition and marked Exhibit "A" and "(D)", and reference is respectfully directed thereto.

12. C. The determination of alleged excessive profits was not made on the basis of a specific contract or contracts performed by petitioner, but was made upon all that part of the business of the petitioner during the fiscal year commencing December 1, 1942 and ending November 30, 1943, deemed by the War Contracts Price Adjustment Board to be subject to renegotiation.

[fol. 301] 13. D. During the fiscal year ended November 30, 1943, the total sales of the petitioner were $3,548,845.50.

which petitioner in its reports to the War Contracts Price Adjustment Board, separated as follows:

Sales subject to renegotiation	$2,207,574.95
Sales of Standard Commercial Articles (not subject to renegotiation)	1,312,250.07
Civilian sales (not subject to renegotiation)	29,020.48

In the determination made by the War Contracts Price Adjustment Board, apparently no consideration was given to the fact that the sales of Standard Commercial Articles, in the amount of $1,312,250.07, were not subject to renegotiation, and all of said sales were considered as sales subject to renegotiation. Upon the total sales of $3,548,845.50, the War Contracts Price Adjustment Board determined that the Company realized profits of $1,393,470.36 *before* Federal income and excess profits taxes (reduced to $402,129.99 after provision for Federal income and excess profits taxes of $1,100,550.37, less post war refund of excess the sum of $1,265,000.00 was determined to be excessive profits realized by the petitioner.

14. E. Aside from the "Order Under Delegated Authority Determining Excessive Profits," dated January 11, 1945 (Exhibit "A"), the petitioner has not been furnished with any statement setting forth the facts, if any, upon which the determination of excessive profits was based, or any reasons for making such determination.

[fol. 302] 15. F. The only information ever given petitioner as to any alleged basis for the determination of the alleged excessive profits was the oral statement of a representative of the Chicago Office of the War Contracts Price Adjustment Board (where the determination was first made), that said Board had disallowed certain costs of petitioner aggregating $145,000.00 representing alleged excessive salaries paid to petitioner's officers amounting to $125,000.00, bad debts amounting $17,000.00, amortization amounting to $1,000.00, and "reclassified sale of capital assets" in the amount of $2,000.00. Subsequently, in two conferences in Washington, the first with representatives of the War Contracts Price Adjustment Board, and the second with Mr. Julius Amberg, Special Assistant to the said Robert P. Patterson, no statement was made to petitioner as to the basis of said determination other than the assertion of said representative and Mr. Amberg that $1,265,

000.00 represented the amount of petitioner's alleged excessive profits for the fiscal year ended November 30, 1943.

16. G. In the "Order Under Delegated Authority Determining Excessive Profits," dated January 11, 1945, adopted by the War Contracts Adjustment Board as its order of May 3, 1945, (Exhibit "A"), appears the statement:

> "In connection with such renegotiation proceedings, a conference was held with the Contractor at or in connection with which there were submitted by the Contractor and obtained from governmental or other [fol. 303] reliable sources, certain financial, operating and other data relating to the Contractor's business and the Contractor's profits derived from said contracts with the Departments and subcontracts during said fiscal year. At and in connection with such conference the Contractor has been afforded full opportunity to submit such additional information and to present such contentions as the Contractor deemed material to a determination of excessive profits within the meaning of the Renegotiation Act."

Notwithstanding said statements by Robert P. Patterson, Under Secretary of War, the petitioner is still without any knowledge or information concerning the "certain financial, operating and other data relating to the Contractor's business and the Contractor's profits derived from said contracts with the Departments and subcontracts during said fiscal year" allegedly obtained by the Under Secretary, or the War Contracts Price Adjustment Board "from governmental or other reliable sources," and allegedly used in said determination.

17. H. In the "Order Under Delegated Authority Determining Excessive Profits," dated January 11, 1945, adopted by the War Contracts Price Adjustment Board as its order of May 3, 1945 (Exhibit "A"), appears the statement:

> "In determining the excessive profits hereinafter determined, due consideration has been given to all such financial, operating and other data and information so furnished or obtained, to each of the contentions so presented, and to all of the factors referred to in [fol. 304] subsection (a) (4) (A) of the Renegotiation Act."

Notwithstanding said statements by Robert P. Patterson, Under Secretary of War, the petitioner is still without any knowledge or information as to the consideration, if any, allegedly given to all "such financial, operating and other data and information so furnished or obtained," and to the consideration, if any, allegedly given "to all of the factors referred to in subsection (a) (4) (A) of the Renegotiation Act."

IV

Assignment of Errors

18. The determination by the respondent that petitioner received excessive profits during the fiscal year ended November 30, 1943, is erroneous and unlawful in each of the following respects:

A. The Renegotiation Act, in so far as it purports to subject petitioner to renegotiation and to require it to pay any sum whatsoever to the United States on account of its business in said fiscal year, is unconstitutional, void and without lawful effect for the following reasons:

(1) The Renegotiation Act violates the provisions of Amendment V of the Constitution of the United States in that it deprives petitioner of its property without due process of law.

(2) The Renegotiation Act violates the provisions of Amendment V of the Constitution of the United States in that it provides for the taking of petitioner's property without just compensation.

[fol. 305] (3) The Renegotiation violates the provisions of Amendment X of the Constitution of the United States in that it provides for the exercise of power not granted to the United States.

(4) The Renegotiation violates Article I, Section 1, of the Constitution of the United States in that it unlawfully delegates legislative power to the respondent.

(5) The Renegotiation Act violates Amendment VII of the Constitution of the United States in that it deprives petitioner of a jury trial in a controversy cognizable at common law involving more than $20.00.

19. B. The Renegotiation Act as applied to the petitioner is vague, uncertain and indefinite, in that it does not contain:

(1) Any standard, measurement or rule for the determination of excessive profits;

(2) Any description of or restriction upon the data, facts or information to be considered in the determination of such alleged excessive profits, or the weight to be given any such factors;

(3) The factors appearing in Section 403 (a) (4) (A) of the Renegotiation Act are indefinite, vague and uncertain, and the Renegotiation Act fails to establish what weight and consideration are to be given said factors,

and in each of these respects the Renegotiation Act is in violation of Amendments V and X of the Constitution of the United States.

20. C. Each of the acts of the War Contracts Price Adjustment Board, purported to have been taken pursuant to [fol. 306] said Renegotiation Act, as hereafter more particulary set forth, was and is illegal and without lawful effect and was in violation of the provisions of the Constitution of the United States and the Amendments aforesaid in that said acts of said respondent deprived petitioner of property without due process of law and result in the taking of petitioner's property without just compensation.

21. D. The War Contracts Price Adjustment Board erroneously determined that the petitioner realized any excessive profits during the fiscal year commencing December 1, 1942 and ending November 30, 1943, and erred in failing to find and determine that petitioner realized no excessive profits during said fiscal year.

22. E. The War Contracts Price Adjustment Board erroneously determined that the petitioner realized excessive profits of $1,265,000.00 on its sales alleged to be subject to renegotiation during the fiscal year commencing December 1, 1942 and ending November 30, 1943.

23. F. The War Contracts Price Adjustment Board in determining the amount of alleged excessive profits realized by the petitioner, erroneously and illegally disallowed a salary expense in the amount of $125,000; that said War Contracts Price Adjustment Board should have found and determined that said amount was a proper and deductible cost attributable to the making of petitioner's sales.

24. G. The War Contracts Price Adjustment Board in determining the amount of alleged excessive profits realized [fol. 307] by the petitioner, erroneously and illegally disallowed other proper items of petitioner's cost, as set forth

in paragraph 15 hereof, in the sum of $20,000.00; that said War Contracts Price Adjustment Board should have found and determined that said amount was a proper and deductible cost.

25. H. The War Contracts Price Adjustment Board, in its determination of the amount of alleged excessive profits realized by the petitioner, erroneously and illegally included sales of Standard Commercial Articles as defined by Section 403 (a) (7) (A, B, C), made by petitioner in the aggregate amount of $1,312,250.07.

26. I. The War Contracts Price Adjustment Board in determining that petitioner realized excessive profits of $1,265,000.00, erroneously, improperly and illegally failed to give due and proper consideration to the following factors:

(1) Efficiency of the petitioner with particular regard to attainment of quantity and quality production, reduction of costs, and economy in the use of materials, facilities and manpower;

(2) Reasonableness of petitioner's costs and profits, with particular regard to volume of production, normal pre-war earnings, and comparison of war and peacetime products;

(3) Amount and source of public and private capital employed by petitioner and its net worth;

(4) Extent of risk assumed by petitioner, including the risk incident to reasonable pricing policies;

[fol. 308] (5) Nature and extent of petitioner's contribution to the war effort, including inventive and developmental contribution and cooperation with the Government and other contractors in supplying technical assistance;

(6) Character of petitioner's business, including complexity of manufacturing technique, character and extent of subcontracting, and rate of turn-over.

27. J. The War Contracts Price Adjustment Board in making its determination, erroneously and improperly failed to give due and proper consideration to the great amount of the income and excess profits taxes of petitioner for the fiscal year ended November 30, 1943, and their effect upon the Company's earnings.

28. K. The War Contracts Price Adjustment Board, in making its determination of alleged excessive profits, er-

roneously failed to consider and give proper effect to the petitioner's normal earnings on non-renegotiable sales; and likewise erroneously failed to consider and give proper effect to the fact that all of petitioner's sales were made upon strictly competitive basis.

29. L. The War Contracts Price Adjustment Board in making its determination of alleged excessive profits, has acted without authority of law, arbitrarily, capriciously, and without regard to the evidence presented.

[fol. 309] V

Statements of facts

30. *A. Type and Character of Business:*

(1) Petitioner was incorporated November 30, 1936 under the laws of the State of Delaware as the Diesel Equipment Corporation, preparatory to acquiring all the assets of a New York company of the same name. The incorporation and acquisition of the assets of the New York company was prompted by the fact that the New York corporation had just prior thereto entered into a contract with the Allis-Chalmers Company, wherein the latter agreed to purchase from the New York company its entire requirements of diesel fuel injection equipment, and it was deemed advisable to broaden the capitalization of the company so that additional funds would be available to finance the anticipated expansion resulting from the Allis-Chalmers contract. During the fiscal year (December 1, 1936 to November 30, 1937) the company's sales were $509,252.47, upon which it realized a profit of $133,210.22 before Federal taxes. Late in the year 1937 Allis-Chalmers Company changed the design of its engine and discontinued the purchase of fuel injection equipment from petitioner. During the years 1938-1939 the petitioner's operations as manufacturer of diesel equipment were reduced and the manufacture of precision parts for aircraft was commenced. The company's name was changed to Aircraft & Diesel Equipment Corporation on July 11, 1940.

[fol. 310] 31. (2) Petitioner's business during the fiscal year December 1, 1942 to November 30, 1943, as in prior years, consisted of the manufacture and sale of diesel fuel injection equipment, precision parts and aircraft precision parts.

32. (3) Petitioner's procedure in making sales is as follows: Petitioner receives from its several customers designs, blueprints, specifications, and requests for prices. Estimates of unit prices for the quantity of items involved in the inquiry are then made by petitioner and furnished to the prospective customer in the form of a quotation on a unit basis. If the quotation is approved by the customer, the customer then delivers to petitioner a purchase order in such form as the customer uses. After the purchase order is received by the petitioner, work is commenced, and shipments made as promptly as possible. Each individual shipment is invoiced when made. Customer's requests for suspension or termination of shipments are accepted without regard to any volume specified in purchase order, where such suspension or termination does not involve completed or partially completed parts; and even when completed parts or partially completed parts are on hand, adjustments solely for work and labor done, are made and without regard to any volume specified in the purchase order. Petitioner has consistently followed this procedure during all times involved in this proceeding.

33. (4) Petitioner is only one of numerous manufacturers of precision parts located in the United States, and [fol. 311] particularly of precision parts for aircraft engines and diesel fuel engines. The quality of its products, the reasonableness of its prices and its manner of doing business have caused petitioner's operations to be successful.

34. (5) In the data submitted to the War Contracts Price Adjustment Board, petitioner showed that on sales of $2,207,574.48, treated by it as subject to renegotiation, it realized a profit *before* taxes of $853,318.03, or 38.66% of the selling price; that on the sale of products of the character described in the Renegotiation Act as "Standard Commercial Articles," amounting to $1,312,250.07, it realized a profit before taxes of $520,187.45, or 39.64% of the selling price; that on Civilian sales amounting to $29,020.48, it realized a profit *before* taxes of $11,671.34, or 40.22% of the selling price; an overall profit before taxes of $1,385,176.52, or 39.03% of the selling price. *After* provision for taxes these figures were: Renegotiable Business, profit $239,653.90, or 10.86% of sales; Standard Commercial Articles, profit $155,431.97, or 11.84% of sales; Civilian Sales, profit

$7,044.12, or 24.27% of sales, an overall profit of $402,129.99, or 11.33% of sales.

35. (6) In the determination made by the War Contracts Price Adjustment Board, on total sales of $3,548,845.50, the profit *before* taxes is $128,470.36, or 3.63% of the total sales, and the profit *after* taxes is $53,729.99, or 1.51% of the total sales.

[fol. 312] *B. Additional Facts Relied Upon in Support of the Assignment of Error:*

36. In the conferences with the office of the War Contract Price Adjustment Board at Chicago, Illinois, and with delegates or employees of delegates of the War Contracts Price Adjustment Board, Washington, D. C., reference was made by the Board to normal prewar earnings, and comparisons invited. While the Company had but one normal pre-war year, 1937, due to the conditions detailed in paragraph 30 hereof, and the succeeding years, 1938, 1939 and 1940, which were spent in redesigning resulted in either a loss or a small profit, such comparison was easily made.

The following schedule shows the pre-war earnings for the years 1937 and 1941, and percentages of profit in those years compared with the years 1942 and 1943, before and after renegotiation demands:

(Here follows, 1 paster, side folio 313)

[fol. 313]

Aircraft & Diesel Equipment Corporation

Comparative Profit and Loss Before and After Renegotiation Demands

Fiscal years ended November 30, 1937, 1941, 1942 and 1943

Before renegotiation	Year ended November 30, 1937 Amount	Percentage	Year ended November 30, 1941 Amount	Percentage	Year ended November 30, 1942 Amount	Percentage	Year ended November 30, 1943 Amount	Percentage
Sales—Net	$509,252.47	100.000	$1,105,106.75	100.000	$2,706,477.33	100.000	$3,548,845.50	100.000
Cost of sales	296,939.57	58.309	724,724.27	65.579	1,425,316.99	52.663	1,745,738.94	49.192
Gross profit	$212,312.90	41.691	$ 380,382.48	34.421	$1,281,160.34	47.337	$1,803,106.56	50.808
General, administrative and selling expense	86,030.59	16.893	125,660.90	11.371	325,612.42	12.031	412,570.01	11.625
	$126,282.31	24.798	$ 254,721.58	23.050	$ 955,547.92	35.306	$1,390,536.55	39.183
Other income	11,718.01	2.301	3,774.86	.341	7,216.77	.267	8,293.84	.233
	$138,000.32	27.099	$ 258,496.44	23.391	$ 962,764.69	35.573	$1,398,830.39	39.416
Other deductions	4,790.10	.941	28,294.22	2.560	31,398.05	1.160	5,360.03	.151
Income before provision for federal income taxes	$133,210.22	26.158	$ 230,202.22	20.831	$ 931,366.64	34.413	$1,393,470.36	39.265
Provision for federal income taxes	17,228.09	3.383	91,500.00	8.280	667,591.17	24.667	991,340.37	27.934
Net income	$115,982.13	22.775	$ 138,702.22	12.551	$ 263,775.47	9.746	$ 402,129.99	11.331
After renegotiation demands								
Sales—net	$509,252.47	100.000	$1,105,106.75	100.000	$2,706,477.33	100.000	$3,548,845.50	100.000
Reduction in sales—price redetermination					775,000.00	28.635	1,265,000.00	35.645
	$509,252.47	100.000	$1,105,106.75	100.000	$1,931,477.33	71.365	$2,283,845.50	64.355
Cost of sales	296,939.57	58.309	724,724.27	65.579	1,425,316.99	52.663	1,745,738.94	49.192
Gross profit	$212,312.90	41.691	$ 380,382.48	34.421	$ 506,160.34	18.702	$ 538,106.56	15.163
General, administrative and selling expenses	86,030.59	16.893	125,660.90	11.371	325,612.42	12.031	412,570.01	11.625
	$126,282.31	24.798	$ 254,721.58	23.050	$ 180,547.92	6.671	$ 125,536.55	3.538
Other income	11,718.01	2.301	3,774.86	.341	7,216.77	.267	8,293.84	.233
	$138,000.32	27.099	$ 258,496.44	23.391	$ 187,764.69	6.938	$ 133,830.39	3.771
Other deductions	4,790.10	.941	28,294.22	2.560	31,398.05	1.160	5,360.03	.151
Income before provision for federal income taxes	$133,210.22	26.158	$ 230,202.22	20.831	$ 156,366.64	5.778	$ 128,470.36	3.620
Provision for federal income taxes	17,228.09	3.383	91,500.00	8.280	96,591.17	3.569	74,740.37	2.106
Net income	$115,982.13	22.775	$ 138,702.22	12.551	$ 59,775.47	2.209	$ 53,729.99	1.514

[fol. 314] 37. In 1937, the total sales were $509,252.47, the profit *before* taxes was $133,210.22, or 26.158% of the sales. The profit *after* taxes in the same year was $115,982.13, or 22.775% of sales. In the year ended November 30, 1943, the total sales were $3,548,845.50, and the profit *before* taxes was $1,393,470.36, or 39.265% of sales. The profit *after* taxes in the year 1943 was $402,129.55, or 11.331% of sales.

38. Upon the basis of the War Contracts Price Adjustment Board's determination, on actual sales of $3,548,845.50, the profit *before* taxes is $128,470.36, being 3.62% of sales, a decrease of $5,000 in profit on an increase of *seven* times the sales and a decrease of 22.5% in the ratio of profit to sales, as compared to the year 1937.

39. Upon the basis of the War Contracts Price Adjustment Board's determination, on actual sales of $3,548,845.50, the profit *after* taxes is $53,729.99, being 1.514% of sales, a decrease of over $62,000 in profit on an increase of *seven* times the sales, and a decrease of 21.26% in the ratio of sales to profit, as compared to 1937.

40. Petitioner respectfully submits that the 1937 basis either before or after taxes is a proper basis for any redetermination of profits.

41. In the year ended November 31, 1941, the total sales were $1,105,106.75, the profit *before* taxes $230,202.22, or 20.831% of sales. The profit after taxes in the same year was $138,702.22, or 12.551% of sales.

[fol. 315] 42. Upon the basis of the War Contracts Price Adjustment Board's determination for the year 1943, on actual sales of $3,548,845.50, the profit before taxes is $128,470.36, or slightly more than 50% of the 1941 profit before taxes on an increase of *three* times the volume of sales.

43. Upon the basis of the War Contracts Price Adjustment Board's determination, the profit in the year 1943 after taxes is $53,729.99, a decrease of $85,000, allowing about 40% of the profit on an increase of *three* times the sales. Likewise, upon the Under Secretary's determination, the ratio of profit to sales before taxes is decreased from 12.551% to 1.51% of sales.

44. The foregoing is submitted in support of the assignment of errors, paragraphs 18, 19, 20, 21, 22, 25, 26, 27, 28 and 29 of this petition, and in contradiction of the statement appearing in the order of January 11, 1945, that due

consideration had been given all the factors named in paragraph (a) (4) (A) of the Renegotiation Act.

45. In the data filed by petitioner with the War Contracts Price Adjustment Board, it was asserted that $1,312,250.07 of the total sales made by petitioner were the sales of "Standard Commercial Articles," as defined by Section 403 (a) (7) (A, B, C), and petitioner submitted uncontroverted evidence of such facts. In the determination of the War Contracts Price Adjustment Board, no consider-
[fol. 316] ation was given to such sales, and the War Contracts Price Adjustment Board denied the petition for exemption.

46. While the basis of the War Contracts Price Adjustment Board's determination is unknown to petitioner, but since such determination confirmed that of the Chicago Office of the War Contracts Price Adjustment Board, it appears that in the determination of the War Contracts Price Adjustment Board it also disallowed $145,000 of petitioner's costs, as did the Chicago Office, representing $125,000 salary disallowance, and $20,000 of other items. During the fiscal year ended November 30, 1943, a total compensation of $276,051.67 was paid to three persons as follows:

	Salary	Bonus	Total
B. Ch. Kelleher	$26,250.00	$77,433.85	$103,683.85
Chase Mellen, Jr.	13,750.00	77,433.85	91,183.85
M. Van Simmons	3,750.12	77,433.85	81,183.97

47. At the time the present officers assumed the management of the company in 1940, the agreement relating to such managment provided that their total fixed salaries should not exceed $25,000 per year until such time as the annual earnings of the company were at least $100,000 after all charges. It was contemplated, however, that an incentive bonus contract should be made as soon as the petitioner's operations were on a profitable basis. Accordingly, on April 21, 1941 a contract was made between the company and the individuals named above providing for the payment of additional compensation equal to 20% of the net profits in
[fol. 317] excess of $50,000.00 for each six months' period from December 1, 1940 to June 15, 1945. This contract was voluntarily cancelled on August 31, 1943, and no incentive compensation was paid after that date. The net profit on which the additional compensation is computed is deter-

mined before income and excess profits taxes, and before the deduction of the additional compensation, subject, however, to the limitations that the net profits of petitioner for the fiscal year, after deducting all bonuses, all income and excess profits taxes, must exceed $100,000. The said employment contracts were made April 21, 1941. They were approved by the Board of Directors and by the holders of the preferred and common stock, before their execution.

48. Petitioner has no other administrative officers. The persons named above were responsible for management, policies, purchases, planning, general supervision, estimates, sales, deliveries, and schedules. They worked long hours each day, seven days a week and performed services for petitioner which ordinarily would require the entire time of many more administrative officers at total salaries in excess of the salaries paid these individuals. The compensation of these administrative officers was reasonable for the services performed by them and the results achieved.

49. Other items of petitioner's cost in the aggregate of $20,000, comprising $17,000 of bad debts, amortization tion $1,000, and reclassified sale of capital assets, $2,000, [fol. 318] were proper items of cost, and the disallowance thereof was error.

50. In the data submitted to the War Contracts Price Adjustment Board there was included photostatic copies of letters received from Murphy Diesel Company, Chevrolet Division of General Motors, Ranger Aircraft Engines, Buick Division of General Motors, and Busch-Sulzer Diesel Engine Company, the largest purchasers of petitioner's products attesting to the facts (which were not denied by the Chicago Office of the War Contracts Price Adjustment Board) that petitioner secured *all* the business on a competitive bid basis; that petitioner's prices were less than other producers of similar products; that petitioner's record of deliveries was excellent, and schedules were maintained, and that the percentage of rejects on petitioner's products (precision parts) was less than 1/10 of 1% and compared most favorably with the record of other producers. These facts established conclusively that petitioner's earnings were the result of efficiency in management, supervision and shop efficiency and not the result of excessive pricing. It also is convincing proof of petitioner's conservation of steel and man hours. The tabulation appearing in paragraph 36

hereof would indicate that little if any recognition was given to the competitive bids, the quality of the merchandise, the performance of delivery schdules, or of any matter which related to the efficiency of the contractor.

[fol. 319] 51. In the data submitted by the petitioner reference was made to the fact that petitioner had no cost plus contracts, had not received any advance payments, had received no direct loan from the Defense Plant Corporation (certain customers have loaned petitioner equipment which they received from the Defense Plant Corporation), had made no application for a V or VT loan, and except for Certificates of Necessity, petitioner had provided all the capital used in its business and received no financial assistance from the Government. What consideration, if any, was given to this factor by the Under Secretary or by the Board is unknown.

52. In data submitted by petitioner to the War Contracts Price Adjustment Board, petitioner submitted one complete job on diesel parts and one on aircraft precision parts, from the time work commenced to the finished product, and furnished the Chicago Office with a visual inspection of the work being done. The type of work, precision parts, same requiring a tolerance of 2/10,000 of an inch, attests the complexity of manufacture and the risk of manufacture, all assumed by petitioner. This evidence was not contradicted but the consideration, if any, given these factors is unknown.

53. In support of its claim for consideration, under one of the factors mentioned in paragraph 403 (a) (4) (A), petitioner showed that its manufacturing technique had been made known to all its customers, and inspection invited to the end that any other supplier of those customers [fol. 320] might have the advantage of the studies of petitioner.

54. In the data submitted by petitioner attention was directed to the fact that petitioner had but little material cost, and its profit therefore did not arise upon the mere resale of merchandise purchased. The steel supplied petitioner belongs to the customer, it is not invoiced to petitioner and then reinvoiced in the finished form to the customer. Petitioner's service is in its "know how" and efficiency of production, and its profits result from such efficiency.

IV

Relief sought by petitioner

55. *Wherefore Petitioner Prays:*

(a) That the Court find and determine that the Renegotiation Act violates the Constitution of the United States, for the reasons hereinabove assigned, and is void in its entirety and of no force and effect whatever.

56. (b) That if the Court should not grant the preceding prayer for relief, then petitioner prays that the Court find and determine that respondent's determination of excessive profits made on January 11, 1945 constitutes an unlawful and unconstitutional application of the provisions of the Renegotiation Act to petitioner's business for the year ended November 30, 1943, and that said determination of excessive profits is illegal and of no force and effect whatever.

[fol. 321] 57. (c) That if the Court should not grant either of the preceding prayers for relief, then that the Court find and determine that petitioner realized no excessive profits whatever in the fiscal year ended November 30, 1943, within the meaning and intent of said Renegotiation Act.

58. (d) That if the Court should not grant any of the foregoing prayers for relief, then that the Court find and determine that of the sales made by petitioner in the year ended November 30, 1943, $1,312,250.07 represented the sale of Standard Commercial Articles as defined by the Renegotiation Act, and as such should not have been included in the sales subject to renegotiation.

59. (e) That if the Court should not grant any of the preceding prayers for relief, then that the Court also find and determine that the compensation paid by petitioner to its officers in the year ended November 30, 1943 was reasonable and proper in amount, and that all of such compensation constituted a proper element of cost in determining petitioner's net profits, including its net profits on sales, if any, subject to renegotiation.

60. (f) That if the Court should determine that petitioner's sales are subject to renegotiation and that excessive profits have been realized, then that it redetermine the amount of such excessive profits in accordance with the Re-

negotiation Act, and after giving due consideration to petitioner's evidence.

[fol. 322] 61. That the Court grant petitioner such further and additional relief to which it may be entitled.

Aircraft & Diesel Equipment Corporation, By ——, President; Samuel M. Rinaker, Earl B. Wilkinson, Arthur R. Hall, Samuel W. Witwer, Jr., 231 S. La Salle Street, Chicago, Illinois.

[fol. 323] State of Illinois, County of Cook, ss.

B. Ch. Kelleher, being first duly sworn on oath, deposes and says that he is the President of Aircraft & Diesel Equipment Corporation, a corporation, petitioner herein, and is authorized to verify the foregoing petition on behalf of Aircraft & Diesel Equipment Corporation, petitioner herein; that he has read the foregoing petition and that the matters therein set forth are true, except those matters therein alleged upon information and belief, and as to such matters he believes them to be true to the best of his knowledge.

—— ——.

Subscribed and sworn to before me this — day of —, A. D. 1945.

——, Notary Public.

[fol. 324] EXHIBIT A

War Department, Office of the Under Secretary
Washington

Order Under Delegated Authority Determining Excessive Profits

Pursuant to authority duly delegated by the War Contracts Price Adjustment Board, a renegotiation proceeding was duly commenced with Aircraft & Diesel Equipment Corporation (hereinafter called the "Contractor") with respect to the aggregate of the amounts received or accrued by the Contractor under contracts with the Departments and subcontracts as defined in the Renegotiation Act (such contracts and subcontracts being hereinafter collectively referred to as "said contracts with the Departments and subcontracts") for the Contractor's fiscal

year ended 30 November 1943 (hereinafter called "said fiscal year").

In connection with such renegotiation proceeding, a conference was held with the Contractor at or in connection with which there were submitted by the Contractor and obtained from governmental or other reliable sources, certain financial, operating and other data relating to the Contractor's business and the Contractor's profits derived from said contracts with the Departments and subcontracts during said fiscal year. At and in connection with such conference the Contractor has been afforded full opportunity to submit such additional information and to present such contentions as the Contractor deemed material to a determination of excessive profits within the meaning of the Renegotiation Act.

[fol. 325] In determining the excessive profits hereinafter determined, due consideration has been given to all such financial, operating and other data and information so furnished or obtained, to each of the contentions so presented, and to all of the factors referred to in subsection (a)(4)(A) of the Renegotiation Act.

As a result of such renegotiation it is hereby determined that $1,265,000.00 represents the portion of the Contractor's profits derived from said contracts with the Departments and subcontracts for said fiscal year, which is excessive within the meaning of the Renegotiation Act. After proper adjustment on account of taxes, other than Federal taxes, measured by income which are attributable to that portion of the Contractor's profits derived from said contracts with the Departments and subcontracts for said fiscal year which is not excessive, it is hereby determined that the amount of excessive profits of the Contractor for said fiscal year which should be eliminated is $1,265,000.00.

This order will be deemed the determination of the War Contracts Price Adjustment Board upon the conditions prescribed in subsection (d)(5) of the Renegotiation Act. If, and as soon as, this order shall be deemed the determination of the War Contracts Price Adjustment Board, pursuant to subsection (d)(5) of the Renegotiation Act, then the Secretary of War (or such official or officials in the War Department to whom the power, function and duty of exercising such authority and carrying out such

direction may be or have been delegated or successively redelegated) is hereby authorized and directed to take such action (including the authorization and direction of any other Secretary or Secretaries to take such action) as is provided by the Renegotiation Act and as he deems appropriate to eliminate such excessive profits to be eliminated.

[fol. 326] In connection with the payment or discharge by any means of such excessive profits to be eliminated, the Renegotiation Act provides that the Contractor shall be allowed the applicable credit, if any, for Federal income and excess profits taxes as provided in Section 3806 of the Internal Revenue Code.

Dated, Issued and Entered on 11 January 1945.

Robert P. Patterson, Under Secretary of War, Acting on behalf of the War Contracts Price Adjustment Board created by the Renegotiation Act, under due delegations of authority made pursuant to subsection (d)(4) of the Renegotiation Act.

[fol. 327] EXHIBIT B

War Department, Office of the Under Secretary
Washington, D. C.

11 January 1945

Aircraft & Diesel Equipment Corporation, 4401 North Ravenswood Avenue, Chicago, Illinois.

Notice of Order Under Delegated Authority
Determining Excessive Profits

Gentlemen:

You are hereby notified by registered mail that pursuant to renegotiation under the Renegotiation Act, and in accordance with authority delegated by the War Contracts Price Adjustment Board, the undersigned acting in its behalf, issued and entered on the date of this letter, an order determining that of your profits derived from contracts with the Departments and subcontracts for your fiscal year ended 30 November 1943, $1,265,000.00 represent excessive profits which should be eliminated. A signed copy of such order is inclosed herewith.

As provided in the Renegotiation Act, such order may, in the discretion of the War Contracts Price Adjustment Board, be reviewed by such Board upon your request, or upon its own motion, but unless such review shall have been initiated within the time prescribed by the Renegotiation Act, such order shall be deemed the determination [fol. 328] of the War Contracts Price Adjustment Board.

Very truly yours, Robert P. Patterson, Under Secretary of War, Acting on behalf of the War Contracts Price Adjustment Board created by the Renegotiation Act, under due delegations of authority made pursuant to subsection (d)(4) of the Renegotiation Act.

Inclosure Order.

[fol. 329] EXHIBIT C

War Contracts Price Adjustment Board
Washington 25, D. C.

Room 3D 573—The Pentagon

3 May 1945

Aircraft & Diesel Equipment Corporation, 4401 North Ravenswood Avenue, Chicago, Illinois.

Gentlemen:

The War Contracts Price Adjustment Board has considered your request, which was received on 3 March 1945, that it review the unilateral determination entered on 11 January 1945, determining excessive profits of $1,265,000 for your fiscal year ended 30 November 1943, and has decided not to initiate such a review. Accordingly, there is enclosed herewith a formal notice advising you that this unilateral determination is deemed the determination of the War Contracts Price Adjustment Board.

As set forth in paragraph 625.4 of the Renegotiation Regulations, the 90-day period for filing a petition for redetermination in the Tax Court runs from the date of the mailing of the enclosed notice, i.e., from 3 May 1945.

Very truly yours, (Signed) J. S. Feight, Lieutenant, USNR, Secretary.

Encls.

[fol. 330] EXHIBIT D

War Contracts Price Adjustment Board
Washington 25, D. C.

Room 3D 573—The Pentagon

3 May 1945

Aircraft & Diesel Equipment Corporation; 4401 North Ravenswood Avenue, Chicago, Illinois.

Gentlemen:

You are hereby notified that, no review having been initiated by the War Contracts Price Adjustment Board, either on your request or on its own motion, of the order dated, issued and entered on 11 January 1945 pursuant to renegotiation under the Renegotiation Act, by Robert P. Patterson, Under Secretary of War, acting on behalf of the War Contracts Price Adjustment Board in accordance with authority delegated by it, determining that of your profits derived from contracts with the Departments and subcontracts for your fiscal year ended 30 November 1943, One million, Two hundred Sixty-five thousand dollars ($1,265,000) represents excessive profits which should be eliminated, such order is deemed the determination of the War Contracts Price Adjustment Board.

A copy of such order is enclosed herewith.

This notice is being mailed to you by Registered Mail on 3 May 1945.

According to the letter dated January 30, 1945 from the Internal Revenue Agent in Charge, the applicable tax credit, as provided in Section 3806 of the Internal Revenue Code, amounts to $994,235.28. Assuming the correctness of the basis upon which the computation of such tax credit [fol. 331] was made, as set forth in the aforesaid letter, the balance due the Treasury of the United States is $270,764.72. Any check for this amount should be drawn to the order of the Treasurer of the United States and delivered to the Chairman, War Department Price Adjustment Board, Room 3D 573—The Pentagon, Washington 25, D. C.

Demand is hereby made for the payment of the amount of excessive profits to be eliminated less the applicable tax credit as provided in Section 3806 of the Internal Revenue

Code. Interest will accrue at the rate of 6% per annum from and after 18 May 1945 on any amount due under such order and unpaid.

Very truly yours, War Contracts Price Adjustment Board, By J. S. Feight, Lieutenant, USNR, Secretary.

Countersigned: Maurice Hirsch, Colonel, General Staff Corps, Acting on behalf of the Secretary of War.

[fol. 332] [File endorsement omitted]

[fol. 333] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF B. CH. KELLEHER—Filed July 2, 1945

(General Affidavit.)

B. Ch. Kelleher, being first duly sworn, on oath deposes and says that he is now and has been since June, 1940 the President and General Manager of Aircraft & Diesel Equipment Corporation; that affiant has heretofore made and executed affidavits pertaining to contracts and sales made by Aircraft & Diesel Equipment Corporation to various purchasers of its equipment during the fiscal years ended November 30, 1942 and November 30, 1943; that attached to said affidavits are photostatic copies of letters, telegrams and other documents showing the several contracts made prior to April 28, 1942, and computations of shipments made upon said contracts, all of which said separate affidavits are hereby, by reference, adopted and made a part of this affidavit, the same as if copied herein.

Affiant further states that:

(1) All computations contained in said affidavits have been made under affiant's supervision of F. D. Barney and his associates, employees of Lybrand, Ross Bros. & Montgomery, Certified Public Accountants, 231 South La Salle Street, Chicago, Illinois, and that all of said computations have been made from the original books of record of Aircraft & Diesel Equipment Corporation, kept and maintained by the corporation at 4401 North Ravenswood Avenue, Chicago, Illinois.

(2) That he has been advised by his attorneys, Gallagher, Rinaker, Wilkinson & Hall, 231 South La Salle Street, Chicago, Illinois: (a) that the Renegotiation Act, enacted February 25, 1944, did not subject the sales of Aircraft & Diesel Equipment Corporation made in the fiscal year ending November 30, 1943 to renegotiation under said Act; that if said Act be so construed as to subject said sales to renegotiation, then said Act is, to that extent, unconstitutional and void, and the entire sales made during the year 1943 are not subject to renegotiation; (b) that if the Renegotiation Act is determined to be constitutional and valid and to subject sales made in the fiscal year ending November 30, 1943 to renegotiation under said Act, then all sales [fol. 334] made upon the contracts dated prior to April 28, 1942, between Aircraft & Diesel Equipment Corporation and its several purchasers are not subject to renegotiation under said Act; that he has been requested by said attorneys to cause computations to be prepared in such a manner as to show all facts and circumstances in connection with said contracts and with sales made during said fiscal year ended November 30 in each of the years 1942 and 1943, and in such a manner as to reflect: (a) the entire sales of Aircraft & Diesel Equipment Corporation made during the fiscal year ended November 30, 1943 to its largest purchasers upon contracts made by Aircraft & Diesel Equipment Corporation prior to April 28, 1942; (b) the sales made to its largest purchasers during the year 1943 on indiyidual purchase orders received by Aircraft & Diesel Equipment Corporation prior to April 28, 1942; (c) the entire sales of Aircraft & Diesel Equipment Corporation made during the fiscal year ended November 30, 1942, to the largest purchasers upon contracts made prior to April 28, 1942 (the date of the enactment of Section 403 of the Sixth Supplemental National Defense Appropriation Act) in support of Aircraft & Diesel Equipment Corporation's further contention that said Section 403 did not subject said sales to renegotiation under said Section 403, and if said Section 403 be so construed, then that said Section 403 was for that reason, and other reasons, unconstitutional and void; (d) the sales made to the largest purchasers during the year 1942 upon individual purchase orders received by Aircraft & Diesel Equipment Corporation prior to April 28, 1942; and (e) whether said sales or any of

them were sales intended for Lend-Lease; that in the time allowed for the preparation of said computations and the examination of the great number of documents in support of these contentions, affiant has, to the best of his ability, followed said instructions and the computations attached hereto detail such facts.

(3) Said computations show that during the fiscal year ended November 30, 1943, of the total sales of $3,548,845.50 of Aircraft & Diesel Equipment Corporation, $2,780,009.82 of said sales were made to Fairchild Engine & Airplane Corporation (Ranger Division, Buick Division of General Motors Corporation, Chevrolet Division of General Motors Corporation, and Allison Division of General Motors Corporation, upon contracts made between Aircraft & Diesel Equipment Corporation and such purchasers prior to April 28, 1942, as is more fully shown by the separate affidavits made by this affiant pertaining to said four purchasers. That in affiant's opinion, even assuming the constitutionality of the Renegotiation Act (which assumption is in affiant's opin-[fol. 335] ion an erroneous assumption) said sales in the amount of $2,780,009.82 were not subject to renegotiation under the provisions of the Renegotiation Act adopted February 25, 1944; that of said total shipments of $2,780,009.82 in the fiscal year ended November 30, 1943, $175,423.75 of the shipments were made upon so-called purchase orders received by Aircraft & Diesel Equipment Corporation prior to April 28, 1942; that this affiant does not know the ultimate users of some of the products manufactured for said purchasers, but during the year 1943 a substantial part of said shipments (in excess of $210,000) are known to be Lend-Lease shipments; and affiant believes that said shipments and others of similar character were not subject to renegotiation under the Renegotiation Act, even if said act be finally determined to be constitutional.

(4) That in the Determination of Excessive Profits made by Robert P. Patterson, dated January 11, 1945 and confirmed by the War Contracts Price Adjustment Board, May 3, 1945, the total sales of Aircraft & Diesel Equipment Corporation for the year 1943 were considered as subject to renegotiation under the Renegotiation Act passed February 25, 1944, and no attempt was made to eliminate from such sales those (a) upon contracts made prior to the enactment of such renegotiation law, (b) those made upon con-

tracts made prior to April 28, 1942, or (c) those made under Lend-Lease, which were not sales to the United States or any department or agency thereof.

(5) That said computations show that during the fiscal year ended November 30, 1942, of the total sales in the amount of $2,706,477.33 of Aircraft & Diesel Equipment Corporation, $1,886,770.11 of said amount were made to Fairchild Engine & Airplane Corporation (Ranger Division), Buick Division of General Motors Corporation, Chevrolet Division of General Motors Corporation, and Allison Division of General Motors Corporation upon contracts between Aircraft & Diesel Equipment Corporation and such purchasers made prior to April 28, 1942, as is more fully shown by the affidavits of this affiant pertaining separately to each of said four purchasers; that in affiant's opinion, even assuming the constitutionality of Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942 (which assumption in affiant's opinion is an erroneous one) said sales in the amount of $1,886,770.11 were not subject to renegotiation under the provisions of said Section 403; that of said total shipments of -1,866,770.11, in the fiscal year ended November 30, 1942, $1,625,023.65 of said shipments were made upon so-called purchase orders received by Aircraft & Diesel Equipment Corporation from said above named purchasers and General Motors Corporation (Packard Electric Division), Hudson Motor Car Com-
[fol. 336] pany and Studebaker Corporation, prior to April 28, 1942; that this affiant does not know the ultimate uses of its products during the fiscal year ended November 30, 1942, but a substantial portion of such shipments, in excess of $92,000, are known to be Lend-Lease sales and affiant believes that said shipments and others of a similar nature were not subject to renegotiation under said Section 403 of the Sixth Supplemental National Defense Appropriation Act, even if said Section be constitutional.

(6) That in the Unilateral Determination of Excessive Profits made by Robert P. Patterson for the fiscal year ended November 30, 1942, sales of $2,446,000 were considered as being subject to renegotiation under such Section 403 enacted April 28, 1942, and no attempt was made to eliminate from such sales those (a) made upon contracts had prior to the enactment of such Section 403, and (b) those made under Lend-Lease, which were not sales to the United States or any Department or agency thereof.

(7) That Aircraft & Diesel Equipment Corporation during the years 1942 and 1943 realized no excessive profits; that upon sales of $2,706,477.33 during the year 1942, its profit, before taxes, was $931,366.64, reduced by income and excess profits taxes to $263,775.47, or 9.746% of sales; that upon sales of $3,548,845.50 during the year 1943, its profit before taxes was $1,393,470.36, reduced by income and excess profit taxes to $402,129.99, or 11.33% of its sales.

(8) That the sales made by Aircraft & Diesel Equipment Corporation during the years 1942 and 1943 were not sales made to the United States of America or any agency or department thereof, because of the necessity of the United States of America to acquire speedily and without regard to price any of such articles so manufactured by Aircraft & Diesel Equipment Corporation; but, as is shown by the separate affidavits of this affiant, said sales were made to corporations having capable and efficient purchasing departments, who first requested from Aircraft & Diesel Equipment Corporation, and presumably from others, quotations and estimates, and accepted the quotations of Aircraft & Diesel in numerous instances while rejecting them in other instances; that Aircraft & Diesel Equipment Corporation was prepared to make the articles upon which its quotations were made, including those quotations rejected by said purchasers; that said rejected quotations were all upon parts for aviation engines needed for the completion of the same engines in which the parts manufactured by Aircraft & Diesel Equipment Corporation were used, and presumably said parts not made by Aircraft & Diesel were supplied by other manufacturers of aviation engine parts whose prices were lower than those of Aircraft & Diesel Equip-
[fol. 337] ment Corporation, or for some other reason known to the purchaser of said parts.

(9) That substantially more than one-half of its business during the years 1942 and 1943 was the manufacture of products which the company had made prior to the declaration of war, and that in respect of such business, the cost of producing the device or part, the methods by which it was manufactured and the normal requirements therefor were not only well known in the industry, but also to the armed services of the United States, the Army and the Navy.

(10) That the normally well informed employees of the United States had every opportunity to know the amount

of profits normally derived by manufacturers of similar products and by Aircraft & Diesel Equipment Corporation.

(11) That the idea that the Army and the Navy bought at the highest prices to obtain speed in production is not applicable to the business done by Aircraft & Diesel Equipment Corporation. Affiant's experience reveals that many of company's customers repeatedly questioned quotations made by this company and demanded lower prices; and affiant sometimes found that the company was selling at a loss; that Aircraft & Diesel Equipment Corporation made studies from time to time of its costs on different of its products and, based upon such studies; revised its prices both to higher prices and to lower prices. From the date of the assumption of control of Aircraft & Diesel Equipment Corporation by this affiant and his associates, in June, 1940, to the present date, Aircraft & Diesel, with an unsatisfactory record of performance behind it, experienced difficulties in securing business. Its record of fair and honest dealings with its customers, its prices and its performance in accordance with required specifications and within the time prescribed by its customers, have resulted in the retention and increase of its business, without increasing the cost of its product to the United States of America.

(12) That Aircraft & Diesel Equipment Corporation's profits, giving effect to the increased volume and to its experience in operation are not excessive by comparison with its operations during the year 1937, when, upon sales of $509,252.47, it realized a profit, before taxes, of $133,210.22 or 26.158% of its sales, reduced to $115,982.13 by taxes, or 22.775% of its total sales; that no comparison should be or can be made with the operations of Aircraft & Diesel Equipment Corporation in the years 1938, 1939 and 1940, for the reason that having lost its single customer in the latter part of the year 1937, Aircraft & Diesel Equipment Corporation was compelled to redesign all its products for general use, and the years 1938, 1939 and 1940 [fol. 338] were spent in such redesigning and retooling as made possible its operations in 1941 and subsequent years; that by January 1, 1941 Aircraft & Diesel Equipment Corporation had developed a diesel fuel injection pump of such a nature that sales in excess of the sales actually made in 1941, 1942 and 1943 of aircraft engine parts might reasonably have been expected, with profits upon said pump sales

comparable to the profits actually made in said years (before so-called renegotiation) had not the facilities of Aircraft & Diesel Equipment Corporation been directed to the war effort.

(13) That Aircraft & Diesel Equipment Corporation at all times has operated in a cooperative manner with its purchasers as is best shown by its ability to adapt its facilities to the increasing needs of such purchasers, and that such cooperation has been possible without government aid except for certificates of necessity and for the loan of government-owned equipment from some of its purchasers.

(14) That making due allowances for increased sales, the profits of Aircraft & Diesel Equipment Corporation have been due to shop efficiency, conservation of critical materials and man hours, harmonious labor relations, and not to the alleged necessity of purchasers or of the United States to secure aviation engine parts, regardless of cost and without ample time to secure competitive estimates from other manufacturers of similar parts.

(15) That as of June 27, 1945, the accounts receivable of the company aggregated approximately $190,000 due from over thirty customers; that in order to secure the withholding or the payment of said sum, the United States of America will be required to direct not less than thirty purchasers to withhold payment or to make said payments to the Treasury of the United States; that in the operation of its business the company has secured the good will and approval of its customers; that it has avoided any and all litigation with its purchasers; that Aircraft & Diesel Equipment Corporation will be required to bring suit against more than one of said purchasers to determine the constitutionality of the Renegotiation Act or of Section 403 of the Sixth Supplemental National Defense Appropriation Act, and that it will incur great expenses, and will be required to institute suits in more than one locality, and will by such action seriously interfere with its continued operations in the war effort, sustain loss of time of its employees and destroy the relations now existing between itself and its several customers.

(16) That affiant has caused to be filed and there is now pending in The Tax Court of the United States petitions for redetermination of the alleged excessive profits of the [fol. 339] company for the fiscal years 1942 and 1943, and

that in the event said Section 403 of the Sixth Supplemental National Defense Appropriation Act and the Renegotiation Act be finally declared constitutional, Aircraft & Diesel Equipment Corporation will be required to pay or cause to be paid to the United States of America, such amount as represents excessive profits realized during said years, after appropriate tax adjustments; that until said determination shall have been made, Aircraft & Diesel Equipment Corporation ought not be required to pay the sum of $270,000 as excessive profits for the year 1943, in addition to the $204,000 previously collected before a redetermination in The Tax Court and thereby incur the risk of impairment of its working capital and the impairment of its war effort.

(17) That affiant makes this affidavit for and in support of the complaint heretofore filed in this cause to enjoin the secretaries, as defined in the Renegotiation Act, from directing customers of Aircraft & Diesel Equipment Corporation to withhold or pay into the Treasury of the United States such amounts as shall have been determined by the secretaries or the War Contracts Price Adjustment Board to represent excessive profits, until there has been a determination of the constitutionality of said Section 403 of the Sixth Supplemental National Defense Appropriation Act, and the Renegotiation Act, and, if such final determination be that said acts are constitutional, then until there has been a redetermination in The Tax Court of the United States of the alleged excessive profits realized by the company.

Further affiant saith not.

B. Ch. Kelleher.

Subscribed and sworn to before me this 29 day of June, 1945. Arthur R. Hall, Notary Public. (Notarial Seal.)

(Here follows 1 photolithograph, side folio 340)

NAME of CUSTOMER	SHIPMENTS FOR THE YEAR ENDED NOVEMBER 30, 1942						
	12-4-41 TO 4-28-42		4-29-42 TO NOV. 30, 1942				
	ORDERS PRIOR TO 4-28-42		ORDERS PRIOR TO 4-28-42		ORDERS AFTER 4-28-42		
	REGULAR	LEND LEASE	REGULAR	LEND LEASE	REGULAR	LEND LEASE	TOTAL
RANGER Aircraft Engines, Division Fairchild Engine and Airplane Corporation	$ 18091808	$ 9780 39	$ 554898 39	$ 56604 31	$ 40205 75	$ 36844 77	$ 879251 69
GENERAL MOTORS							
Buick	4142 56		69710 65		13236 64		87089 85
Chevrolet - all divisions	3991 571		47526 39		24367 13		111809 23
ALLISON	44902 04		37555 95		18958 45		101416 44
Woodward Governor Company	84489 60		133319 10		332212 70		550021 40
NAVY DEPT. Bureau of Supplies & Accounts	3530 00		71115 00		536 50		157181 50
	357877 99	9780 39	914125 48	56604 31	511517 17	36844 77	1886770 11
PACKARD ELECTRIC DIVISION							
General Motors	54192 70		119786 95		19328 50		193308 15
STUDEBAKER Corporation Aviation Division	21731 85		12530 16		18916 21		53178 22
HUDSON Motor Car Co. / Westinghouse Elec. Mfg. Co. } U.S. NAVAL ORDNANCE PLANT	20752 93		57620 89		89216 45		167590 27
	96677 48	-	189938 00	-	127461 16	-	414076 64
TOTAL	$ 454575 47	$ 9780 39	$ 1104063 48	$ 56604 31	$ 638978 33	$ 36844 77	$ 2300846 75

SHIPMENTS FOR THE YEAR ENDED November 30, 1943.

ORDERS PRIOR TO 4-28-42		ORDERS AFTER 4-28-42			PER CENT TO TOTAL SALES YEAR ENDED Nov 30, 1943
REGULAR	LEND LEASE	REGULAR	LEND LEASE	TOTAL	
$ 10791029	$ 386255	$ 108721856	$ 20621954	$ 140521094	
3768729		21832031		25600767	
781083		32890244		33671327	
1815275		8866697		10681972	
		50109322		50109322	
		17416500		17416500	
17156116	386255	239836657	20621954	278000984	80.45
(4280)		12517987		12513707	
		8857149		8857149	
		19297619		19297619	
(4280)	—	40672755	—	40668475	11.77
$ 17151836	386255	$ 280509412	20621954	$ 318669457	92.22

[fol. 341] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF B. CH. KELLEHER IN RESPECT OF FAIRCHILD ENGINE AND AIRPLANE CORPORATION (RANGER AIRCRAFT ENGINES DIVISION)—Filed July 2, 1945

B. Ch. Kelleher, being first duly sworn, on oath deposes and says that he is now and has been since June 1940, the President and General Manager of Aircraft & Diesel Equipment Corporation, (hereinafter referred to as "Plaintiff"); that this affidavit pertains solely to the relations of Plaintiff with Ranger Aircraft Engines, a Division of Fairchild Engine and Airplane Corporation, (hereinafter referred to as "Ranger"), and that this affidavit is one of a series of affidavits made by this affiant pertaining to the contracts of Plaintiff with purchasers of its products. This affidavit and the exhibits attached hereto is made in support of the position of Plaintiff that a substantial portion of its sales made in the fiscal years ended November 30, 1942, November 30, 1943 and November 30, 1944 are not subject to renegotiation.

[fol. 342] Affiant states that;

(1) The photostatic copies of the documents attached to this affidavit are all true and correct copies of either letters or telegrams sent by Ranger to Plaintiff or by Plaintiff to Ranger; that the computations attached hereto and made a part hereof marked "Exhibit R-x" have been made by affiant, or by auditors furnished by Lybrand, Ross Bros. & Montgomery, certified public accountants, from the books of original entry kept and maintained by Plaintiff in the ordinary course of its business, and that affiant believes all of said computations to be correct.

(2) In his opinion Plaintiff had a contract with Ranger for the purchase of aircraft parts on October 5, 1940, and at all times thereafter; that said contract was not subject to renegotiation by reason of any subsequently enacted statute, and that the basis for said opinion is as hereinafter set forth.

(3) During the calendar year 1939 and prior to December 1, 1940, Plaintiff had been manufacturing for Ranger twenty-seven (27) parts for aircraft engines; the manufac-

ture of said parts and others continued from December 1, 1939, and during the calendar year 1940. On or about August 19, 1940, Ranger furnished Plaintiff with a schedule showing its requirements for Army engines during the year 1941, and thereafter, and requested Plaintiff to quote prices on said requirements in monthly quantities; that pursuant to said request of Ranger, Plaintiff, on August 30, 1940, wrote to Ranger quoting prices and terms upon thirty (30) parts in monthly quantities in accordance with said schedule for engines for the Army, a copy of which said letter is attached hereto marked "Exhibit R-1" and made a part hereof.

[fol. 343] (4) Thereafter and prior to September 21, 1940, various conversations were had between this affiant and other officers and employees of Plaintiff with Duncan B. Cox, Vice President and General Manager of Ranger, relative to the proposal of Plaintiff, as is attested by letters from Ranger to Plaintiff dated September 21, 1940 and September 30, 1940, copies of which said letters are attached hereto, marked "Exhibits R-2 and R-3" respectively.

(5) Thereafter on October 5, 1940, this affiant advised Ranger by telephone that Plaintiff was prepared to meet Ranger's then schedule, and would waive the provision for advance payment, mentioned in the letter of Plaintiff to Ranger dated August 30, 1940, (Exhibit R-1) if Ranger in turn would waive the necessity of a performance bond by Plaintiff; that this proposal was accepted by Ranger, and Plaintiff then made changes in its shop production, machinery and personnel in order to comply with the Ranger then scheduled requirements.

(6) On or about June 2, 1941, Plaintiff received from Ranger a telegram requesting information as to additional machine equipment necessary to furnish Ranger parts for 200 six-cylinder engines, and 50 twelve-cylinder engines per month, commencing January 1, 1942, a copy of which said telegram is attached hereto and made a part hereof marked "Exhibit R-4". Upon receipt of this telegram, Plaintiff advised Ranger that it had sufficient machine capacity to handle parts for 200 six-cylinder engines, 50 twelve-cylinder engines, starting deliveries January 1, 1942, a copy of which said telegram is attached hereto as "Exhibit R-5".

[fol. 344] (7) Thereafter numerous conferences occurred between this affiant and other officers of Plaintiff and the officers of Ranger, relative to the execution of a contract

between Ranger and Plaintiff whereby Ranger agreed to procure for Plaintiff certain addi-ional machinery and Plaintiff agreed to reserve for Ranger 25% of its plant facilities and production, in order to insure the delivery of the parts needed by Ranger from Plaintiff to meet its scheduled requirements. Such conferences took place in either Plaintiff's offices or those of Ranger, and telephone calls and letters passed between the parties from August 1941, relative to a contract by the terms of which Plaintiff undertook to reserve for Ranger's requirements twenty-five per cent of its production subject to Ranger's continuing orders. All of the terms and conditions of such contract were agreed upon prior to January 1, 1942, including a provision that Ranger would provide Plaintiff with additional machinery, some of which had then (January 1, 1942) been furnished by Ranger to Plaintiff and some of which was later furnished from time to time as it was available. The oral contract between Ranger and Plaintiff was formalized by a written agreement dated as of January 1, 1942. A copy of such contract is attached hereto, made a part hereof and marked "Exhibit R-6".

(8) On December 31, 1941, Plaintiff received from Ranger a telegram requesting information as to additional machinery required to furnish Ranger with 250 sets of Navy parts monthly, a copy of which said wire is attached hereto marked "Exhibit R-7".

[fol. 345] (9) On or about January 31, 1942, Plaintiff received from Ranger a telegram advising Plaintiff that Ranger's schedule for six-cylinder engines had been increased from the then schedule to 400 monthly by July 1942, and that Ranger's schedules for twelve-cylinder engines had been increased from its then requirements to 100 monthly in June 1942, and 500 monthly by January 1, 1943; in said wire, Ranger requested Plaintiff to advise Ranger as to Plaintiff's ability to meet these increased requirements of parts Plaintiff was then making for Ranger, and if additional machinery was necessary to immediately advise. A copy of such telegram is attached hereto as "Exhibit R-8"; and thereafter on February 13, 1942, Ranger again telegraphed Plaintiff as to its increased monthly requirements, and requested Plaintiff to advise what machinery it needed to meet said schedules, a copy of which said telegram is attached hereto as "Exhibit R-9".

(10) On February 14, 1942, Plaintiff advised Ranger of the additional machinery required to meet "400 engines per month starting July 1, 1942", and the additional machinery necessary to meet "875 engines per month by January 1, 1943", a copy of which said letter is attached hereto marked "Exhibit 10"; and on March 17, 1942 and March 20, 1942, Plaintiff advised Ranger in writing of its acceptance of such increased monthly schedules of furnished the machinery, copies of which said letters are attached hereto, marked "Exhibit R-11" and "Exhibit R-12" respect*fully*.

(11) On March 27, 1942, Plaintiff advised Ranger in accordance with Ranger's telephone request, of the additional machinery necessary to meet the requirement of 875 engines per month, a copy of which said letter is attached hereto marked "Exhibit R-13".

[fol. 346] (12) Following the letter of March 27, 1942, (Exhibit R-13) Ranger procured for Plaintiff the additional machinery requested, or substitutes therefor, and Plaintiff installed said machinery and thereafter Plaintiff complied with Ranger's monthly requirements of parts manufactured by Plaintiff to meet said Ranger's monthly engine schedule.

(13) Following each "step up" in Ranger's requirements of engine parts made by Plaintiff, the affiant caused to be made or personally made, (a) shop surveys showing work in production and prior and unfilled orders, (b) an examination of machinery then in Plaintiff's plant, and (c) listings of available personnel for such increased requirements, and affiant made or caused to be made such changes as were necessary to insure Plaintiff's performance of Ranger's requirements or increased requirements. As said increases were made Ranger supplied Plaintiff with steel necessary to meet said increased schedules; that in affiant's opinion Ranger relied upon Plaintiff's ability to supply the parts then being made by Plaintiff for Ranger in the amounts necessary to meet all of the said increased requirements, and such reliance was based upon the agreement of October 5, 1940, as augmented from time to time as to increased amounts of parts to be supplied by Plaintiff.

(14) Commencing February 16, 1943, Ranger's orders for parts on its schedule carried the legend relative to Renegotiation as shown in "Exhibit R-14" attached hereto and made a part hereof.

(15) On February 16, 1943, and at all times prior and subsequent thereto, this affiant believed that the sales made

to Ranger under the arrangements aforesaid were not subject to renegotiation since all of said sales were upon a contract made prior to April 28, 1942; that, in addition, affiant was informed and believed that the provision for [fol. 347] renegotiation appearing in the Sixth Supplemental National Defense Appropriation Act as such was and is unconstitutional and void, and in view thereof no renegotiation could be had under or pursuant to the provision of said Act; that in any event said Renegotiation legend appearing on Ranger's orders after February 16, 1943, did not authorize, direct or permit renegotiation of any sales made in the year 1943, under the terms and provisions of the Renegotiation Act adopted February 24, 1944.

(16) In affiant's opinion all sales made by Plaintiff to Ranger during the years 1942 and 1943 were made pursuant to and in accordance with a contract made between the parties on October 5, 1940, and that all of said sales are exempt from renegotiation; that in order to furnish to the Court and all parties interested, full and complete details, the computation of the Ranger sales during the years 1942 and 1943 have been prepared as set forth in "Exhibit R-15" and "Exhibit R-16" attached hereto and made a part hereof.

Further affiant sayeth not.

B. Ch. Kelleher.

Subscribed and sworn to before me this 29th day of June, A. D., 1945.

Clyde F. DeWitt, Notary Public (Seal)

[fol. 348] "EXHIBIT R-1"

August 30, 1940

Mr. Duncan B. Cox, Vice-President,
Ranger Aircraft Engines,
Farmingdale, L. I., N. Y.

Ranger Army Engine Requirements

Dear Sir:

We have your inquiry of August 19, covering your Army Engine requirements for the year of 1941 or longer, and advise that we will be glad to co-operate fully with you in

meeting the needs of the Army Program for the production of Ranger engines.

We have made a careful study of your requirements as stated in your letter of August 19, and advise that our company has the ability, the willingness, and the desire to supply you with your requirements as given in detail below, every month in the year of 1941 or beyond, provided we will receive your order within 30 days from the date of this letter and we will be given four months' time to prepare parts for shipment.

We are prepared to ship you per month the following items at the prices stated:

Ranger part #	Description of Item	Monthly quantity	Unit Price	Total
5026	Lock-Intake Valve Sprg. Washer	3,600	0.44 per pr.	$414.00
5027	Lock-Exhaust Valve Sprg. Washer	3,600	0.44 per pr.	414.00
5069	Gear-Pr. Oil Pump Driven	300	1.25 ea.	375.00
5158	Shaft-Pr. Oil Pump Driven Gear	300	.34 ea.	102.00

[fol. 349]

Aug. 30, 1940

Ranger Aircraft Engines—2

Ranger part #	Description of Item	Monthly Quantity	Unit Price	Total
5312	Insert Tachometer Gear	600	75.50 per C	$246.00
5367	Jaw-Starter Driving	300	5.07 ea.	1,521.00
6424	Rivet-Valve Rocker Roller	3,600	7.91 per C	144.00
6571	Gear-Tachometer Short	300	4.50 ea.	1,350.00
6624	Gear-Tachometer Long	300	4.50 ea.	1,350.00
6687	Seat-Pr. Oil Relief Valve	300	1.79 ea.	336.00
6689	Spring-Pr. Oil. Rel. Valve Adjusting	300	0.71 per C	96.30
6789	Sleeve-Vac. Pump Drive Gear	300	26.92 per C	80.76
7095	Washer-Fr. Vert. Dr. Shaft Idler Thrust	300	.475 ea.	69.00
7102	Washer-Fr. Vert. Dr. Shaft Upper Gear Thrust	300	.503 ea.	78.00
7103	Washer-Fr. Vert. Dr. Shaft Lower Gear Thrust	300	.395 ea.	66.00
7104	Washer-Fr. Camshaft Gear Thrust	300	.53 ea.	90.00
7237	Shaft-Valve Rocker Hub	3,600	76.40 per C	$1,761.12
7581	Gear-Scav. Oil Pump Drive	300	10.85 ea.	$3,255.00
7673	Shaft-Tech. Dr. Ider Gear	300	.25 ea.	75.00
7874	Gear-Tach. Drive Idler	300	1.38	414.00
7814	Spacer-Crankshaft Gear	300	3.83	1,149.00
7828	Bushing-Cam Box Cyl. Stud Frt.	300	12.00 per C	36.00
*5062	Gear-Accessory Dr. Shaft Front	300	3.34 ea.	1,002.00
*7822	Gear-Lower Front Idler Spur	300	9.89 ea.	2,967.00
*7824	Gear-Upper Front Idler	300	5.75 ea.	1,725.00
*7825	Gear-Rear Idler	600	6.53 ea.	3,918.00
*7826	Gear-Magneto & Vac. Pump Driven	300	9.66 ea.	2,898.00
*7827	Gear-Magneto Drive	300	7.51 ea.	2,253.000
5068	Gear-Pr. Oil Pump Driving	300	1.32 ea.	396.00
*5321	Gear-Accessory Dr. Shaft Rear	300	6.73 ea.	2,019.00

* Note: Forgings furnished by Ranger without cost to us.

[fol. 350] In order to produce the above quantities, additional tools and fixtures will be necessary. We are willing

to limit the tool and fixture charge to $15,000.00, and therefore quote tool charges to you on a time and material basis, limited to a total of $15,000.00.

We did not quote on Gear, Scav. Oil Pump Driven, part #7306, of which we had no drawing, and part #7212, Gear Crankshaft, with which further experimentation is to be made before a definite price can be quoted.

Our above quotation is based upon receiving a definite order from you for at least twelve months' requirements and a cash advance payment of 50% with your order, which advance will be refunded to you at the rate of 50% deducted from all bills rendered by us.

Our quotation is based upon today's prices for material and labor and subject to change in accordance with changes in labor and material upon due proof given to you of such change.

It is understood that all material which you are going to supply against your order will be shipped to us in sufficient quantity and without delay, enabling us to produce the order without unnecessary set-ups or interruptions.

Due to the fact that we will reserve the necessary plant capacity to execute your orders, we will not accept cancellations of any part of the order. Delivery promises are based on normal expectancy, Acts, or demands of the United States Government, fires, strikes, accidents to machinery or other causes unavoidable or beyond our control. Any quantity up to 10% in excess of or less than the quantity ordered will be regarded as completing the order.

[fol. 351] Any changes in the design or material of the parts will be charged provided such changes will cause extra operations or delays in the execution of the particular part.

In closing, we wish to state that since we have made the parts in question in the past and we are making some of them at the present time, we are entirely familiar with all the problems related to the parts quoted and we are in a position to produce them at the rates specified and of the quality you would require.

Hoping that we shall be favored with your valued order, we are

Yours very truly, Aircraft & Diesel Equipment Corporation, by—President. BCK:t

[fol. 352] "EXHIBIT R-2"

Ranger Aircraft Engines

Division of Fairchild Engine & Airplane Corporation
Farmingdale, L. I., N. Y., Phone: Farmingdale 280

September 21, 1940

Mr. Kelleher, Pres. & Gen. Mgr.
Aircraft & Diesel Equip. Corp.
4401 N. Ravenswood Avenue
Chicago, Illinois

Dear Mr. Kelleher:

All of us appreciate very much the opportunity yesterday to discuss our mutual problems, and we were glad that you were able to take enough time to meet so many of our organization.

We are going to rush consideration of the two basis on which your company would like to do business with us, and just as soon as the decision is made, we will advise you so that no time will be lost for either of us.

For your files, there is enclosed a carbon of the retype of my pencil notes; which were taken at the conclusion of the conversation with you and Mr. Mellen, and which were read back to you.

We are looking forward to a continuing large volume of business with your company, and we hope that this will be accompanied by frequent opportunities for your organization and ours to get together and directly discuss mutual problems.

Sincerely yours, Ranger Aircraft Engines, Duncan B. Cox, Vice Pres. & Gen. Mgr..

DBC:RAH
enclosure
cc — Mr. Mellen

[fol. 353] Mr. Mellen, Mr. Kelleher, Mr. Koster and Mr. Cox on September 20, 1940 agreed:

(1) Diesel now has $270,000 unfilled and is shipping about $70,000 per month.

(2) Diesel offers to accept orders from Ranger on basis of quotations computed by same method as those in letter dated August 30, 1940 for following amounts per month of delivery:

(a) $10,000 per month standing deliveries in four months with no deposit and no additional capacity reserved beyond orders placed.

(b) $30,000 per month starting in four months, if a 50% deposit is made. Under these conditions Diesel will also reserve for us (give first refusal) on an additional $15,000 per month of deliveries, making a total of $45,000 per month for two years.

(3) Diesel will secure deposits with a performance bond satisfactory to our counsel and repay deposit by permitting a reduction of 50% in the amount of each invoice until deposit is repaid.

(4) "Reserve" in paragraph 2b above means if Diesel desires to accept orders from others which encroach on Rangers reserved capacity Diesel will advise Ranger and Ranger shall promptly state the length of time for which the reserved capacity is not required by Ranger. At the conclusion of this time Ranger shall place orders if Diesel has not been notified one month in advance that reserve period has been extended.

(5) The foregoing excludes all orders already placed which Diesel agrees to deliver as promised.

(6) This agreement is to replace and superceed agreement made with Ranger by Mr. Mellen, Foder, and Blakey.

(7) Diesel agrees to carry out the terms of this agreement on the basis of either 2a or 2b if notified by Ranger within two weeks.

(8) Diesel can get machinery at auction to be held on 25th but must have the cash deposit to bid. Otherwise new machinery deliveries must be facilitated by Ranger to meet deliveries. Machinery cost $60,000, tooling $15,000, inventory $75,000.

Duncan B. Cox

DBC:RAH

[fol. 354] "EXHIBIT R-3"

Fairchild Engine and Airplane Corporation
30 Rockefeller Plaza, New York, N. Y.

Air Mail

September 30, 1940

Mr. Chase Mellen
Aircraft & Diesel Equipment Corp.
4401 N. Ravenswood Avenue
Chicago, Illinois

Dear Mr. Mellen:

It is necessary that Mr. Cox be out of town several days this week and, in view of this, he requested that I communicate with you for the purpose of advancing the arrangements discussed at Farmingdale last week. Unfortunately, when I phoned your office I found you were en route to Chicago.

I gather that the tentative arrangement concluded at Farmingdale is satisfactory to you and, if so, it appears that the next step is to work out the type of bond that will cover either performance, or the repayment of our advances, if such *such* should ever be required.

We are, of course, anxious to move quickly as are you and, therefore, if I can be of any assistance, please call upon me during Mr. Cox's absence.

Also, if you return to New York within the next day or two, it may be helpful if we can confer on the matter.

Cordially yours, W. H. Schwebel, Secretary-Treasurer.

WHS:NML
cc: Mr. D. B. Cox

[fol. 355] "EXHIBIT R-4"

CB87 TWS Paid 3—TDN Farmingdale NY 2 332P Jun 2 PM 2.50 Aircraft and Diesel Equipment Corp—4401 North Ravenswood Ave—

Advise if and what additional machine equipment necessary to furnish us facilities for 200 sixes and 50 twelves per month starting January delivery. Require this information before June Fourth—

Ranger Aircraft Engines E Koster.

200 50.

[fol. 356] "EXHIBIT R-5"

June 2, 1941.

Ranger Aircraft Engines, Mr. E. Koster, Farmingdale, L. I., New York.

Retel believe we have sufficient machine capacity to handle parts for 200 - 6's and fifty twelves starting January delivery. This of course takes into consideration machinery plus Monarch lathe now on order through your Mr. Lloyd.

Aircraft & Diesel Equipment Corporation, B. C. Kelleher.

[fol. 357] "EXHIBIT R-6"

Agreement dated as of the 1st day of January, 1942, between Fairchild Engine and Airplane Corporation, a Maryland corporation, acting through its Ranger Aircraft Engines Division (hereinafter called Ranger), and Aircraft & Diesel Equipment Corporation, a Delaware corporation, (hereinafter called Diesel).

Ranger is engaged, among other things, in the manufacture and sale of in-line air-cooled airplane engines at its plant in Farmingdale, Long Island, New York, and in connection with such manufacture purchases from others certain gears and other parts for incorporation in said engines.

Diesel is engaged, at its plant in Chicago, Illinois, in the manufacture and sale of precision gears and other parts for installation in airplane and automotive engines.

Ranger has advised Diesel that it desires to purchase from Diesel a substantial portion of the gears, together with certain other parts of types now on order from Diesel (hereinafter collectively called gears), required for its present and future production program and Diesel desires to sell such gears to Ranger. Diesel has advised Ranger that it desires to avoid jeopardizing its present sound position to the fullest extent possible, consistent with meeting its [fol. 358] obligations in the present national emergency. Diesel will not be able, without increasing its gear-manufacturing machinery equipment, to supply Ranger, within the time desired by Ranger, with the gears which Ranger desires to purchase from Diesel and is unable to make the capital expenditure necessary for an increase in its gear-

manufacturing capacity which may be required only during the existing national emergency, the duration of which is uncertain.

Ranger desires and Diesel is willing that Diesel's gear-manufacturing capacity shall be increased. Ranger has entered into a contract dated December 31, 1940 (hereinafter called contract NOd-1646) with the United States of America (hereinafter called the Government) pursuant to which certain machinery listed in Schedule A attached hereto (hereinafter referred to as the machinery) has been or will be purchased by Ranger and delivered to Diesel; Diesel represents that it has good and marketable title to the land, described in Schedule B attached hereto, upon which the machinery is to be located, that such land is accurately described in said Schedule B, and that such land is not subject to any lien or encumbrance which will or may attach to the machinery when installed.

In consideration of the premises and of the mutual agree-[fol. 359] ments hereinafter set forth, the parties hereto agree as follows:

1. Delivery and Installation of the Machinery. Ranger will use its best efforts to purchase and have delivered f.o.b. Diesel's plant at 4401 North Ravenswood Avenue, Chicago, Illinois, such of the units of machinery, or substitutes therefor, as Ranger has not heretofore purchased and delivered to Diesel's plant, and Diesel will, upon receipt of each unit of the machinery, promptly install such unit in said plant. Diesel shall pay, and include in its general overhead expense, the cost of installing the machinery.

Ranger shall not be liable for any injuries, including injuries resulting in death, or for loss or damage to property resulting from the installation, operation or maintenance of the machinery by Diesel and Diesel shall indemnify and save harmless Ranger from and against any and all claims by third parties as the result of said injuries, loss or damage.

2. Ownership of Machinery. Each unit of the machinery shall remain and at all times be personal property and shall not in any manner be or become part of any realty by reason of its installation in Diesel's plant or affixation thereto. Title to each unit of the machinery shall at all times remain and be in Ranger and/or the United States as their respective interests may appear, and Diesel's only

interest therein shall be as the bailee thereof in accordance with the terms of this agreement. Diesel shall at all times keep affixed to each unit of machinery legible and conspicuous metal tags or plates, in such form as directed by Ranger, and shall take such other action as Ranger may from time to time request in writing for the purpose of [fol. 360] marking or identifying each unit of the machinery so as to make each such unit readily identifiable as having been furnished hereunder and to indicate the Government's equitable interest therein.

Diesel shall not allow any mortgage or other lien to become an encumbrance upon the machinery or any unit thereof and shall promptly remove any lien which may attach thereto.

3. Insurance and Taxes. Diesel shall, in respect of the machinery, take out and maintain insurance against such risks as similar machinery is customarily insured against in the locality of Diesel's plant, or as directed by Ranger, and in such amounts as Ranger shall from time to time specify by notice in writing. The policies evidencing such insurance shall provide for the payment of any proceeds thereof to, and shall be deposited with, Ranger or such other corporation, firm, individual or government agency as Ranger shall direct. Diesel shall pay and include in its general overhead expense, the cost of all such insurance.

In the event that the machinery or any part thereof shall be destroyed or damaged, Diesel shall immediately notify Ranger in writing in detail of the cause and extent of such damage and the estimated cost of restoring, reconditioning or replacing the machinery so destroyed or damaged and shall cooperate with Ranger in taking such action, if any, [fol. 361] as the Government may require or permit Ranger to take with respect to the restoration, reconditioning or replacement of the machinery so destroyed or damaged.

Property tax returns covering the machinery shall be made by Diesel for Ranger in Ranger's name and Diesel shall pay the local taxes levies or assessed against the machinery or against Ranger or Diesel by reason of the ownership or operation thereof and charge the amount of such taxes to and include the same in its general overhead expense. Ranger shall cooperate with Diesel in making such returns or authorizing Diesel to execute the same in Ranger's name.

4. Maintenance. Diesel shall, at its own expense, care for and maintain the machinery and forthwith comply with any directions given by Ranger with respect to the care and maintenance thereof; upon the termination of this agreement Diesel shall return the machinery to Ranger in a good state of maintenance and repair except for destruction, wear or damage normally incident to the production carried on by Diesel and not caused by the fault or negligence of Diesel.

[fol. 362] 5. Manufacture of Gears. Diesel, to the extent of twenty-five per cent. (25%) of its "present total capacity" as hereinafter defined, will manufacture and sell to Ranger all such gears and parts as now manufactured by Diesel or which can be manufactured by Diesel with the use of the machinery as Ranger shall from time to time order from Diesel. "Present total capacity" shall mean the entire capacity of all Diesel's present machinery and equipment as presently operated plus the entire capacity of the machinery and equipment to — furnished by Ranger as herein provided. It shall not include additions to machinery and equipment, if any, hereafter installed by Diesel or other customers of Diesel, or any machinery, in addition to the machinery specified in Schedule A hereto, which may subsequently be loaned to Diesel by Ranger. Diesel may add additional machinery and equipment, provided, however, the operation of same shall not interfere with the efficient manufacture of gears and parts by Diesel for Ranger as herein provided.

6. Price Structure. From time to time at Ranger's request Diesel will quote to Ranger the prices at which Diesel will manufacture for Ranger gears of the various types specified by Ranger, and Ranger will from time to time issue individual purchase orders for such gears and parts as it shall desire to purchase. Prices quoted or included in accepted orders shall be adjusted from time to tome at any [fol. 363] time during the progress of the work by increase or decrease as the case may be in accordance with fluctuation in the costs of Diesel. Delivery dates and terms of payment shall be agreed upon and incorporated in each order. Delivery dates agreed upon shall be maintained subject to delays caused by fire, wind or damage to or destruction of plant or equipment, strikes, lockouts, Federal or State laws and regulations, or other causes beyond the con-

trol of Diesel. All prices so quoted by Diesel to Ranger shall be prices computed in accordance with Diesel's usual method of estimating quoted prices (estimated direct labor and material costs, plus the equitable portion of Diesel's fixed and general overhead, plus a reasonable profit), with which method Ranger is familiar, provided that the prices so quoted to Ranger shall not include any charges (including amortization and depreciation), other than such charges, as are expressly authorized herein, for or in respect of the machinery. Such prices shall not be in excess of prices quoted to other customers for similar work less any charges in connection with the machinery (except such charges as are authorized herein). Diesel will agree to the inclusion in all such purchase orders of any conditions or agreements required by law to be included therein or which Ranger is required by law to cause to be included therein. [fol. 364] 7. Priority as to 25% of capacity; use of Ranger machinery on other orders. Subject to the provisions of paragraph 8 hereof, all orders for the purchase of gears and parts given by Ranger to Diesel and accepted by Diesel shall have full priority of the use of twenty-five per cent (25%) of Diesel's present total capacity as defined in paragraph 5 hereof, and Diesel will use on Ranger orders the machinery best fitted and adapted to Ranger's gears and parts, regardless of whether owned by Ranger or Diesel, and correspondingly Diesel may, without payment to Ranger, use Ranger machinery, or any one or more units thereof, in connection with filling orders for others than Ranger within the limits of the capacity herein reserved by Diesel for others.

8. Temporary Waiver of Priority. If at any time Diesel does not have orders from Ranger requiring the use of twenty-five per cent 25%) of Diesel's present total capacity as defined in paragraph 5 hereof and shall desire to accept orders from others than Ranger, to the amount of such deficit, Diesel may give notice to Ranger of such desire and the details of such orders and the estimated time required to fill the same. If within thirty (30) days after [fol. 365] receipt of such notice, Ranger shall not place orders with Diesel up to said entire twenty-five per cent (25%) of capacity Diesel may then accept sufficient of said orders from others to absorb, for a period not in excess of sixty (60) days, the part of said deficit not absorbed by Ranger

during said thirty (30) days and the use during such period of sixty (60) days by Diesel of its own machinery and the machinery of Ranger in connection with filling any part of the orders described in such request shall not be deemed a violation of the priority stipulations contained in this contract. Despite the acceptance of any such other orders, Diesel will use its best efforts to fill promptly all such orders as may thereafter be given to it by Ranger, it being the true intent and purpose hereof that Ranger and Diesel shall each use its best efforts to cooperate to the end that Ranger shall obtain prompt delivery of the gears ordered by it.

9. Term and Termination. Unless theretofore terminated in accordance with the provisions of this paragraph, this agreement shall terminate on December 31, 1945.

This agreement may ge terminated at any time

A. By Ranger if

(a) contract NOd-1646 shall terminate or be terminated by the Government or by Ranger pursuant to the terms thereof;

[fol. 366] (b) Diesel shall be in default under or shall breach any of its obligations contained in this agreement or any purchase order accepted by it from Ranger (including failure by Diesel to meet its delivery commitments on any such order); or

(c) Diesel shall become insolvent or shall file or have filed against it a petition in bankruptcy or shall take or attempt to take the benefit of any law for the relief or aid of debtors or shall make an assignment for the benefit of creditors, or a receiver of Diesel or of all or substantially all its property shall be appointed; and

B. By Diesel if

(a) Ranger shall be in default under or shall breach any of its obligations contained in this agreement of any purchase order accepted by Diesel from Ranger;

(b) Ranger shall become insolvent or shall file or have filed against it a petition in bankruptcy or shall take or attempt to take the benefit of any law for the relief or aid of debtors, or shall make an assignment for the benefit of creditors, or a receiver of Ranger or of all or substantially all its property shall be appointed; or

[fol. 367] (c) at any time, due to lack of orders from Ranger or others, the machinery installed in Diesel's

Plant, including machinery belonging to Ranger, shall have been operated at an average of less than twenty (20) hours per week per machine during the preceding three calendar months and the Government shall permit the termination of this agreement;

provided, however, that no failure by either party to exercise any right of termination herein given shall be deemed to be a waiver of such right in that or any future instance.

10. Inspection of Machinery. The Chief of the Bureau of Aeronautics, United States Navy, his duly appointed successor or authorized representative, and authorized representatives of Ranger shall at all times be afforded proper facilities for inspection of the machinery, both during and after installation, and shall at all reasonable times have access to Diesel's premises, work and materials, and to all records and books of account relating to the machinery, its care, maintenance, restoration, reconditioning or replacement, which records and books of account shall be kept by Diesel.

11. Protection of Machinery. Diesel shall comply with any requests and instructions which the Government shall require Ranger to make or give Diesel as to precautionary and protective practices to be adopted and measures to be taken to protect the machinery form destruction or damage, but this paragraph shall not release Diesel from the consequence of any fault or negligence on its part.

[fol. 368] 12. Non-discrimination in Employment. Diesel, in performing the work required by this agreement, shall not discriminate against any worker because of race, creed, color, or national origin.

13. Recordation. Diesel will duly record a copy of this contract in such manner as Ranger may require.

14. Reports as to Liens and Encumbrances. Diesel shall, within four (4) months after the installation of all the machinery, furnish Ranger with a report of a title company or other evidence of the condition of the title, satisfactory to Ranger, showing whether there were, ninety (90) days after such installation, any mortgages or other liens upon the machinery or the land or buildings upon or in which such machinery is located; and, within thirty (30) days after the end of the calendar year in which such report is furnished and of each year thereafter until the termination of this agreement, Diesel shall furnish to Ranger a continu-

ation report by a title company, if the original report was by a title company, or otherwise a continuation report of the character of the aforesaid original evidence, satisfactory in each case to Ranger, upon such title, showing the existence or non-existence of any such mortgages or liens.

15. Notices. Any notice to be given hereunder by either [fol. 369] party hereto to the other shall be in writing and shall be sufficiently given if sent by registered mail, in a postage prepaid envelope, if to Ranger addressed to Fairchild Engine and Airplane Corporation, Ranger Aircraft Engines, Farmingdale, Long Island, New York, and if to Diesel addressed to Diesel at 4401 North Ravenswood Avenue, Chicago, Illinois.

16. Assignment. This agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns, provided that this agreement shall not be assignable by either party by operation of law or otherwise without the express written consent of the other.

In witness whereof the parties hereto have executed this agreement the day and year first above written.

Fairchild Engine and Airplane Corporation, by H. H. Budds, Vice President. Aircraft & Diesel Equipment Corporation, by B. Ch. Kelleher, President.

Attest: N. E. Speel, Assistant Secretary.

Attest: M. Van Simmons, Secretary.

[fol. 370] State of New York,
County of Suffolk, ss.:

On this 11th day of September, 1942, before me personally appeared H. H. Budds, to me known, who, by me being duly sworn, did depose and say that he resides at Garden City, New York; that he is Vice President of Fairchild Engine and Airplane Corporation, the Corporation described in and which executed the foregoing instrument; that he knows the seal of said Corporation; that the seal affixed to the foregoing instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

Elbert H. Wild, Notary Public, Certificate Filed Nassau Co. Clk. No. 31W43, Queens County Clerk's No. 2879, Queens County Register No. 9484, Term Expires March 30, 1943.

[fol. 371] State of 1st, County of ——, ss.:

On this — day of October, 1942, before me personally appeared B. Ch. Kelleher, to me known, who, by me being duly sworn, did depose and say that he resides at Chicago, Illinois: that he is President of Aircraft & Diesel Equipment Corporation the Corporation described in and which executed the foregoing instrument; that he knows the seal of said Corporation; that the seal affixed to the foregoing instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said Corporation, and that he signed his name thereto by like order.

T. J. Murphy, Notary Public, My Commission Expires Sept. 1, 1946.

[fol. 372] Aircraft and Diesel Equipment Corporation

SCHEDULE A

2	#7125A Fellows Gear Shaper	NEPF No. 2463, 2464
1	6" x 18" Landis Plain Grinder	2466
1	#72A3 Heald Sizematic Internal Grinder	2468
1	10" x 24" Landis Universal Grinder	2467
1	2½" Cleveland Turret Lathe	2469
1	2" Cleveland Turret Lathe	2470
2	#6W Cincinnati Universal Turret Lathe	3156, 3157
1	14" x 54" Monarch Tool Room Lathe	4186
1	#777 Spur Gear Testing Fixture	2465

[fol. 373] Aircraft and Diesel Equipment Corporation

SCHEDULE B

Aircraft and Diesel Equipment Corporation, 4401 North Ravenswood Avenue, Chicago, Illinois, situated as follows:

"Lots Thirteen (13), Fourteen (14), and Fifteen (15) (Except the North 45 feet of lot fifteen (15) in Block Nineteen (19) in Ravenswood in the South Half of the Northeast Quarter of Section Eighteen (18), Township Forty (40) North, Range Fourteen (14), East of the Third Principal Meridian, In Cook County, Illinois."

[fol. 374] "EXHIBIT R-7"

CL88 TWS Paid—3-TDN WUX Farmingdale NY 31 1251 P 1941 Dec 31 PM 12 49 Aircraft and Diesel Equipment Corp—4401 North Ravenswood Ave—

Advise NY wire or phone today sure additional machines if any necessary to furnish us with 250 sets all Navy parts monthly. Require name of basic machines needed and type. This information necessary to comply with Navy directive.

Ranger Aircraft Engines, E. Koster.

[fol. 375] "EXHIBIT R-8"

CAH226 TWS Paid 3-TDN Farmingdale NY 31 115 1942 Jan 31 PM 1 31 Aircraft and Diesel Equipment Corp—4401 North Ravenswood Ave—

Anticipate firm monthly requirements of six cylinder engines increasing from present schedule to 400 by July 1942 and 875 January 1943. Also firm monthly requirements for twelve cylinder engines increasing from present schedule to 100 in June 1942 and 500 January 1943. Request you advise by return wire your ability to meet these increased requirements of parts you are now making and additional facilities if any required by you to meet this program. Essential this information be in our possession by noon Monday February second.

Ranger Aircraft Engines, E. Koster.

400 1942 875 1943 100 1942 500 1943.

[fol. 376] "EXHIBIT R-9"

LD824GL (8144CC) TWS Paid 3 Duplicate of Telephoned Telegram—WUX TDN Farmingdale NY Feb 13 1942 543P Aircraft and Diesel Equipment Corp. Attn C Kelleher 4401 North Ravenswood Ave Chgo.

Supplementing our wire of January 31st re increased monthly requirements we now request that you submit detailed list of complete facilities of both plant and machine equipment covering tentative list submitted which you consider necessary to meet our program. Request this list be prepared at once and in our possession prior to February 19th to insure inclusion in final negotiations. Show make

type size of machines and what parts machines will be used to produce. Submit also list of special jigs fixtures etc if required to produce parts and descriptive list of anticipated plant expansion and alterations required if firm prices each item not available. Give closest estimated cost but in no case shoul- list be held up on this account.

Ranger Aircraft Engines, E. Koster. 912P

[fol. 377] "EXHIBIT R-10"

February 14, 1942.

Ranger Aircraft Engines, Farmingdale, L. I., New York.
Attn: Mr. E. Koster.
Gentlemen:

In accordance with your telegrams of January 31st and February 13, 1942, we submit the following list of machinery which we believe will enable us to step up our production to meet your requirements for 400 engines per month, starting July 1, 1942.

Item No.		*Estimate*
1	3—#4 Warner & Swasey Turret Lathes with Equipment. For parts 5062, 5321, 5830, 6571, 6624 7762, 7812, 7814, 7822, 7824, 7825, 7826, 7827, 7975, 8123, 8124, 8380, 8381.	$19,107.00
2	3—#2 B. & S. Universal Grinders with #350 Spring Chuck & Collets. (May substitute 2 #C 10x24 Landis) Universal Grinders, $7500.00 Same parts as item #1. 5062, 5157, 5321, 6571, 6624, 7812, 7814, 7822, 7824, 7825, 7826, 7827, 7975, 8123, 8124, 8380, 8381.	10,510.00
3	2—#81 Heald Sizematic with Spring loaded sliding jaw chuck and equipment. For parts 5062, 5068, 5069, 5321, 7674, 7762, 7812, 7814, 7822, 7827, 7975, 8123, 8124, 8380, 8381.	19,650.00

[fol. 378]

Item No.		*Estimate*
4	1—#2B B.&S. Surface Grinder with magnetic Chuck. For parts 5026, 5027, 5321, 6571, 6624, 7419, 7975, 8123, 8380, 8381.	$1,190.00
5	2—#1 B. & S. Universal Grinder & Equipment. For parts 5026, 5027, 5068, 5069, 5157, 5312, 6571, 6624, 6721, 7467, 7674, 7762, 8124.	7,115.00
6	1—#25A Heald Surface Grinder with Equipment. For parts 5068, 5069, 5321, 5830, 7095, 7101, 7102, 7104, 7674, 7812, 7814, 7822, 7824, 7825, 7826, 7975, 8123, 8301, 8625, 8380, 8381.	7,300.00
7	1—#2 B. & S. Vertical Mill, light type with #9 B.&S. taper in spindle. For part 7814, three operations on 8124.	4,180.00
8	1—Van Norman Hand Mill, Reversing mechanism with coolant tank and motor. For parts 5157, 5158, 7419, 7467, 7826, 7827.	1,827.00
9	1—#1 Sundstrand Automatic Production Mill with Automatic spindle stop. For parts 5312, 6689, 7477, 7826.	3,862.00
10	1—Hardinge Second Operation Machine, Collets three and four jaw chucks, tailstock. For parts 6424, 6687, 6689, 7419, 7467 7477, 7673, 7824, 7825.	1,667.90
11	1—Lees-Bradner Thread Mill with Equipment. 6571, 6624, 6687, 7826, 7827, 7477.	7,000.00

[fol. 379]

12	Heat Treating Equipment. L. & N. Carb. Furnace " " work baskets " " " trays	

Item No.		*Estimate*
	Slow cooling unit	
	Temperature control & recorder	
	Tempering Furnace	
	" " baskets	
	" " relay	
	" " Controller	
	" " Panel	
	Hardening Furnace	
	" Controller	
	Cracking Controller	
Lindberg:	Pot Furnace	
	Extra Pot	
B. & C.	Oil Cooler	
Y. & T.	Hoist	
Com'l.	2 Quench Tanks	18,000.00
	Total	$101,408.90

To step up production to 875 per month by January 1, 1943.

Item		
13	3—#4 Warner & Swasey Turret Lathes with Equipment.	16,915.00
14	2—#7125 Fellows Gear Shapers	9,500.00
		$26,415.00

Very truly yours, Aircraft & Diesel Equipment Corporation, B. Ch. Kelleher, President.

BChK:R

[fol. 380] "EXHIBIT R-11"

March 17, 1942.

Ranger Aircraft Engines, Farmingdale, L. I., New York.
Attn: Mr. E. Koster, Director of Purchases.

Gentlemen:

In accordance with your telegraphic request of March 16, 1942, we are enclosing herewith operation sheets on all of the parts that we are making for you, and for which additional facilities are required in order to increase the pro-

duction to meet your requirements for these parts. Our letter to you of February 14, 1942 included a list of the machinery which was submitted in accordance with your telegram of January 31, 1942, and February 13, 1942.

Very truly yours, Aircraft & Diesel Equipment Corporation, B. Ch. Kelleher, President.

BehK:R
Encl.

[fol. 381] "EXHIBIT R-12"

March 20, 1942.

Ranger Aircraft Engines, Farmingdale, L. I., New York.
Attn: Mr. E. Koster.

Gentlemen:

In accordance with your telephone request of this morning, I am enclosing herewith two sets of the machinery specifications for the first step-up to 400 engines per month. I have not included the machines for the second step-up to 875 engines.

Our Production Department has gone over these quite carefully and I think the standard machinery and also the special equipment is all detailed the way I think you want it.

Very truly yours, Aircraft & Diesel Equipment Corporation, B. Ch. Kelleher, President.

BehK:R

[fol. 382] February 14, 1942.

Ranger Aircraft Engines, Farmingdale, L. I., New York.
Attn: Mr. E. Koster.

Gentlemen:

In accordance with your telegrams of January 31st and February 13, 1942, we submit the following list of machinery which we believe will enable us to step up our production to meet your requirements for 400 engines per month, starting July 1, 1942.

Item No.		*Estimate*
1	3—#4 Warner & Swasey Turret Lathes with Equipment. For parts 5062, 5321, 5830, 6571, 6624	$19,107.00

Item No.		Estimate
	7762, 7812, 7814, 7822, 7824, 7825, 7826, 7827, 7975, 8123, 8124, 8380, 8381.	
2	3—#2 B. & S. Universal Grinders with #350 Spring Chuck & Collets. (May substitute 2 #C 10x24 Landis) Universal Grinders, $7500.00 Same parts as item #1. 5062, 5157, 5321, 6571, 6624, 7812, 7814, 7822, 7824, 7825, 7826, 7827, 7975, 8123, 8124, 8380, 8381.	10,510.00
3	2—#81 Heald Sizematic with Spring loaded sliding jaw chuck and equipment. For parts 5062, 5068, 5069, 5321, 7674, 7762, 7812, 7814, 7822, 7827, 7975, 8123, 8124, 8380, 8381.	19,650.00

[fol. 383]

4	1—#2B B.&S. Surface Grinder with magnetic Chuck. For parts 5026, 5027, 5321, 6571, 6624, 7419, 7975, 8123, 8380, 8381.	$1,190.00
5	2—#1 B. & S. Universal Grinder & Equipment. For parts 5026, 5027, 5068, 5069, 5157, 5312, 6571, 6624, 6721, 7467, 7674, 7762, 8124.	7,115.00
6	1—#25A Heald Surface Grinder with Equipment. For parts 5068, 5069, 5321, 5830, 7095, 7101, 7102, 7104, 7674, 7812, 7814, 7822, 7824, 7825, 7826, 7975, 8123, 8301, 8625, 8380, 8[redacted]	7,300.00
7	1—#2 B. & [redacted] Vertical Mill, light type with #9 B.&S. taper in spindle. For part 7814, three operations on 8124.	4,180.00
8	1—Van Norman Hand Mill, Reversing mechanism with coolant tank and motor. For parts 5157, 5158, 7419, 7467, 7826, 7827.	1,827.00

Item No.		*Estimate*
9	1—#1 Sundstrand Automatic Production Mill with Automatic spindle stop. For parts 5312, 6689, 7477, 7826.	3,862.00
10	1—Hardinge Second Operation Machine, Collets three and four jaw chucks, tailstock. For parts 6424, 6687, 6689, 7419, 7467, 7477, 7673, 7824, 7825.	1,667.90
11	1—Lees-Bradner Thread Mill with Equipment. 6571, 6624, 6687, 7826, 7827, 7477.	7,000.00

[fol. 384]

12	Heat Treating Equipment.	
	L. & N. Carb. Furnace	
	" " work baskets	
	" " " trays	
	Slow cooling unit	
	Temperature control & recorder	
	Tempering Furnace	
	" " baskets	
	" " relay	
	" " Controller	
	" " Panel	
	Hardening Furnace	
	" Controller	
	Cracking Controller	
Lindberg:	Pot Furnace	
	Extra Pot	
B. & C.	Oil Cooler	
Y. & T.	Hoist	
Com'l.	2 Quench Tanks	18,000.00
	Total	$101,408.90

To step up production to 875 per month by January 1, 1943.

Item		
13	3—#4 Warner & Swasey Turret Lathes with Equipment.	16,915.00
14	2—#7125 Fellows Gear Shapers	9,500.00
		$26,415.00

Very truly yours, Aircraft & Diesel Equipment Corporation, B. Ch. Kelleher, President.

[fol. 385] "EXHIBIT R-13"

March 27, 1942.

Ranger Aircraft Engines, Farmingdale, L. I., New York.
Attn: Mr. E. Koster.

Gentlemen:

Confirming our telephone conversation of this afternoon, and supplementing our letter of March 20th, we submit the attached list of the additional machines required for the second step-up to 875 engines per month.

Very truly yours, Aircraft & Diesel Equipment Corporation, B. Ch. Kelleher, President.

BchK:R
Encl.

[fol. 386] Warner & Swasey

	Estimate Each
Two (2) N 1372 Single Cutter Turners ¼" to 1" Capacity	85.00
One (1) N 1374 Single Cutter Turners 7/16" to 2" capacity	115.00
One (1) N 1924 Combination end fuser & Turner 3/16" to 2" Capacity	75.00
One (1) H. & O. #102 DMS Die heads with 4 sets of chaser carriers 0" to 1¼" Capacity with each head	150.00
Two (2) H. & O. #103 DMS Die heads with 5 sets of chaser carriers. 0" to 1½" inclusive with each head	150.00
One (1) N 614 Center Drilling Tool	77.00
Three (3) N 1722 Adjustable Tool Holder	18.00
One (1) N 254 Clutch Tap and Die Holder	35.00
Three (3) N 857 Combination stock stop and starting drill	15.00
One (1) Three Jaw Universal Heavy Duty Cushman Chuck #235-B with reversible top jaws	250.00
One (1) N 680 Slide Tool	85.00
One (1) N 1764 Angular Cutter stub boring bars	15.00

	Estimate Each
Three (3) N 613 Drill Chucks	22.00
Four (4) N 949 Drill Sockets #1-2-3-4 H.T.	4.50
Nine (9) N 1887 Short Flanged Tool Holders	12.00
Three (3) N 1888 Long Flanged Tool Holder	15.00
Six (6) N 874 Starting Drills	10.00
One (1) N 1660 Solid type face plates 12" Dia.	39.00
Three (3) 3¾" - 7½ H.P. 1800/900 RPM, 220 Volts, 3 Phase, 60 cycle, 40 Ball bearing motor with magnetic starter	234.00

[fol. 386-A] Warner & Swasey

Three (3) No. 4 Universal Turret Lathes, N-1420—with 18⅛" Swing and 2" x 12" Bar Capacity,
Preselective All Geared Head having 12 spindle speeds forward and reverse,
All Head Gears hardened steel having ground teeth,
Multiple Disc Clutch for forward and reverse speeds,
Head Brake hydraulically operated,
Filtered Force Feed Head Stock Lubrication from Independent oil reservoir in pan,
Flanged Type Spindle Nose,
Spindle Mounted on precision roller bearings,
Hardened and Ground Multiple Splined Sliding Gear Head Shafts mounted on roller bearings,
Collet Chuck, including Master Collet,
Ratchet Type Bar Feed with Protected Bar Support,
Universal Carriage having six Reversible Geared Power Cross and Longitudinal Feeds,
Quick indexing Square Turret,
Hexagon Turret provided with independent Adjustable stops and Automatic Circumference Binder,
Turret Center Mounted on precision roller bearing,
Turret Ram Slides on replaceable, hardened and ground steel piston in the saddle,
Taper Take-up Gibs beneath saddle top caps,
Geared Power Feed to Turret, having six feeds,
Hardened and Ground Steel Channel Way Strip on Front and Flat Strip on rear way,

Oil Pan, Pump and Piping,
Wrenches, etc.
Pedestal Leg Motor Drive with Vee Belts and Pulleys and including push button station.
Price of one machine as described above....$4,815.00 Approx.

[fol. 387] Fellows Gear Shaper Company

Springfield, Vermont

Two (2) #7125-A Type Fellows Gear Shapers, Same as Series #19016 and 19017, Plus 2 sets Raising Blocks for the 7826 Gear.

[fol. 388] "EXHIBIT R-14"

Renegotiation. If this order is subject to the provisions of Title IV of the Sixth Supplemental National Defense Appropriation Act, 1942, the following provisions shall be applicable:

(1) Upon the written request of the Secretary of the Navy, at such period or periods when in the Judgment of the Secretary of the Navy the profits accruing to Vendor under this order can be determined with reasonable certainty, the purchase prices shall be renegotiated by the Secretary of the Navy and Vendor to eliminate therefrom such amount as is found as a result of such renegotiation to represent excessive profits.

(2) There shall be retained by Buyer for the account of the Government or paid to the Government by Vendor at the direction of the Secretary of the Navy any amount of the purchase prices found as a result of such renegotiation to represent excessive profits to Vendor.

(3) Buyer is hereby relieved from any liability to Vendor on account of any amount retained or repaid pursuant to paragraph (2):

[fol. 389] "EXHIBIT R-15"

Analysis of Ranger's Sales for the Fiscal Year Ending November 30, 1942

Shipments made *prior* to 4/28/42 on orders dated prior to 4/28/42	$180,918.08
Shipments made *prior* to 4/28/42 on orders dated prior to 4/28/42 and known to be Lend-Lease	9,780.39
Shipments made *after* 4/28/42 on orders dated prior to 4/28/42	554,[illegible]98.39
Shipments made *after* 4/28/42 on orders dated after 4/28/42	40,205.75
Shipments made *after* 4/28/42 on orders dated prior to 4/28/42 and known to be Lend-Lease	56,604.31
Shipments made *after* 4/28/42 on orders dated after 4/28/42 and known to be Lend-Lease	36,844.77

[fol. 390] "EXHIBIT R-16"

Analysis of Ranger's Sales for the Fiscal Year Ending November 30, 1943

Shipments made on orders dated *prior* to 4/28/42	$107,910.29
Shipments made on orders dated *prior* to 4/28/42 and known to be Lend-Lease	3,862.55
Shipments made on orders dated *after* 4/28/42 including Lend-Lease	1,087,218.56
Shipments made on orders dated *after* 4/28/42 and known to be Lend-Lease	206,219.54

Ranger Motor Div

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

SHIPMENTS for year ended Nov. 30, 1944

SHIPMENTS for year ended Nov. 30, 1943.

PART NUMBER	TOTAL																			
5076	16,421.97	318.78			1,765.60	607.85					1,890.518	15.26			3,106.789			4,730.75		
5077	12,676.28	76.28			918.85	606.80	1,019.57				1,890.30				4,815.51	1,576.10		6,391.63		
5076	48,756.60	4,737.28			18,181.70						4,918.68	56.70			20,143.60			25,118.60		
5078 - 9766	7,507.45	54.20			3,853.45						4,008.65	100.00			10,588.95			11,589.35		
5869	15,736.60	3,013.67			7,739.75						5,765.78	159.60			10,549.15			17,174.75		
5967 - 9769	8,742.61				589.85						589.85	12.00			11,317.50			12,599.50		
5158	18,320.17	139.01			195.09			116.70			1,989.10				4,859.17			4,859.17		
5314	5,614.56	550.80		1,057.70	1,725.45			1,951.30		377.70	6,004.25				11,944.17			11,944.17		
5341	90,044.47	7,977.86			20,107.70						3,338.06	1,090.50			48,184.00			58,890.50		
5830				3,013.80			1,537.80			1,029.15	8,679.99						2,760.51	2,760.51		
6477	5,394.47	68.08		100.00	3,504.70	660.00					5,846.50	577.50			9,630.47		7,200.00	17,407.97		
6571	96,944.50	61,705.00			16,169.00			1,187.50			4,949.00				49,094.00			49,094.00		
6577	8,645.00	1,334.50			1,891.75			19.00			4,171.70				4,831.50			4,831.50		
6687	75,744.00	44,788.47			9,399.33	7,584.85					21,919.12	731.46	1,893.07		28,178.30	7,200.00		38,771.75		
6777	3,495.87				1,171.26	81.00					1,988.12									
6747	940.00			1,034.00		182.70					1,180.70			847.03				4,458.08		
6789	1,161.77				151.96						1,151.96				4,796.00			4,796.00		
7095	1,145.83	1,145.83			707.00						1,852.83				4,759.78			4,759.78		
7104	4,841.11	230.00		37.00	446.00	187.00				4.00	1,814.00	148.00			3,607.87	340.00		4,595.87		
7104	4,896.79			381.85	1,026.29	365.71					1,273.86	6.00	18.00		3,215.78	3,215.78		8,578.78		
7437	40,063.70	1,764.31		1,848.44	16,280.00	1,764.46		15.50		1,713.85	5,565.11				63,059.96	1,278.34		109,337.96		
7414	1,165.00					1,034.63				1,515.18	1,515.18					1,779.84		4,779.84		
7446	3,495.36				3,515.43			3,515.43			3,515.43				4,710.11			4,710.11		
7673	940.00			1,005.00		1,050.14					2,055.14				4,814.14			4,814.14		
7674					381.79						381.79				1,097.03			1,097.03		
7674	43,339.63							1,277.01			1,277.01				7,435.07			7,435.07		
7744	1,833.19	1,833.19			1,670.07						3,503.26				111,855.00			111,855.00		
7814	105,952.51	87,381.30			3,976.24						91,357.54	2,498.97			4,687.25			4,687.25		
7814	34,267.01	3,267.01			1,988.24						5,255.25	29,012.00			35,264.79			35,264.79		
7814	18,701.47	18,701.47			1,982.24						20,683.71				63,935.76			63,935.76		
7814	28,873.19	28,873.19			1,338.93						30,212.12				70,752.72			70,752.72		
7845	1,139.11	1,139.11			1,973.49			1,011.00			4,123.60				9,136.01			9,136.01		
7846	73,738.74	73,738.74			1,515.45						75,254.19	1,377.50			73,993.05			73,993.05		
7847	94,427.61	94,427.61			3,878.38						98,305.99	1,208.40			4,779.80			4,779.80		
7966					1,371.01			1,371.01			2,742.02				4,842.36			4,842.36		
7419	91,365.33	91,365.33			796.58						92,161.91				4,858.94			4,858.94		
7419	33,080.33	33,080.33			1,497.32						34,577.65				4,858.94			4,858.94		
8301	4,509.19	4,509.19		91.91	1,833.30	179.00				1,320.00	6,932.40				4,779.16			4,779.16		
8380	4,509.19	4,509.19			1,467.39						5,976.58				4,809.41			4,809.41		
8381	4,509.19	4,509.19			1,467.39						5,976.58				4,809.41			4,809.41		
8798	1,467.39	1,467.39		91.91		184.88					1,852.27				4,809.41			4,809.41		
	1,126,168.81	1,126,168.81		11,179.68	668,053.75	11,179.68	1,019.57	6,670.87		5,193.96	1,829,266.32	15,826.81	1,893.07		1,126,168.81	11,179.68		1,829,266.32		

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

PAGE 2

PART NUMBER	SHIPMENTS for year ended Nov. 30, 1942 — To 11-30-41	12-1-41 to 4-28-42 — Orders Prior to 4/28/42 — Regular	12-1-41 to 4-28-42 — Orders Prior to 4/28/42 — Lend Lease	4-29-42 to 11-30-42 — Orders Prior to 4/28/42 — Regular	4-29-42 to 11-30-42 — Orders Prior to 4/28/42 — Lend Lease	4-29-42 to 11-30-42 — Orders After 4/28/42 — Regular	4-29-42 to 11-30-42 — Orders After 4/28/42 — Lend Lease	TOTAL	SHIPMENTS for year ended Nov. 30, 1943 — Orders Prior to 4/28/42 — Regular	Orders Prior to 4/28/42 — Lend Lease	Orders After 4/28/42 — Regular	Orders After 4/28/42 — Lend Lease	TOTAL
Amounts Brought Forward	28938439	18091808	9656 19	55489839	56371 41	40205 75	8849 74	850899 26	107910 29	3862 55	1080838 85	99361 15	1291972 84
8154												2471 00	2471 00
8209							2373 20	2373 20				4030 95	4030 95
8919							4149 00	4149 00				53270 61	53270 61
6695							5070 00	5070 00				4413 50	4413 50
7902												2058 65	2058 65
7903												4941 60	4941 60
7109							7768 28	7768 28				5601 96	5601 96
372			144 20		79 20		1130 40	1333 80				161 10	161 10
396970												480 90	480 90
396967												645 00	645 00
396980												592 80	592 80
396990												364 82	364 82
7489							5635 50	5635 50			435 00	13397 75	17777 75
5367	951 42										1605 00		1605 00
535	420 00				154 00		525 35	679 35				2418 85	2418 85
5775							1343 30	1343 30			414 10	12008 90	12423 00
7101											10 61		10 61
	29075581	18091808	9780 39	55489839	56604 31	40205 75	36844 77	879251 69	107910 29	3862 55	1087218 56	206219 54	1405210 94

Ranger

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

1942 SHIPMENTS 1/1/42 to 11/30/42 — SHIPPED & ALL SHIPPED

1943 SHIPMENTS

P.I.C.T.	P.O. No.	DATE	to 11/30/41	12/1/41 to 4/28/42	4/29/42 to 12/31/42	YEAR 1942	1/1/43 to 11/30/43	PRIOR TO 4/29/42	PRIOR TO 4/1/42	ON H. PRIOR TO 4/1/42	RETURNED AFTER 4/1/42	LEND LEASE	ON H. PRIOR TO 4/1/42	RETURNED AFTER 4/1/42	LEND LEASE
5026	11434	10-11-39	42588												
	14983	7-19-40	57500												
	16355	10-9-40	412500												
	17550	12-3-40	231000												
	20413	4-9-41	474567												
	22201	9-4-41	121440	31878	228525	260403	0	31878		228525					
	24539	9-29-41	35475		35475	35475				35475					
— N	26241	2-28-42			511500	511500				511500					
LL N	27868	12-31-41			306900	306900						306900			
— N	33071	4-28-42			476160	476160	1536236			476160			1536236		
LL N	33264	4-28-42			300080	300080						300080			
— N	40634	8-14-42					3106789						3106789		
	70294		1341177	31178	1858610	1890118		31178		1716610		6 180			
5027	11433	10-11-39	41888												
	14984	7-19-40	57500												
	16355	10-9-40	470222												
	17559	12-3-40	231000												
	20413	4-9-41	401214												
	22201	9-4-41		180477	306478	417450		180972		236478					
	24540	9-29-41	39078	81906		81906		81906							
— N	26248	2-28-42			682007	682007				682007					
LL N	27869	12-31-41			306900	306900						306900			
LL N	33263	4-28-42			300080	300080						300080			
— N	40636	8-13-42			1019459	1019459	2987541				1019459		2987541		
LL N	47598	12-9-42					1576102							1576102	
	70273		1467418	1111975	1211720	1190210	4558643	1811720		1211720	1 151	6 180			
5062	12201	10-20-39	57200												
	15643	9-5-40	73480												
	17569	12-2-40	351780	93468	39360	487068		93468		39360					
— N	23803	8-25-41		464400	129600	594000		464400		129600					
	24642	9-26-41			288900	288900				288900					
— N	29479	2-5-42			769500	769500				769500					
— N	30850	3-25-42			590760	590760	567000			590760			567000		
— N	36951	6-4-42					2437560						2437560		
— A	53774	3-9-43					1576800						1576800		
	67038		1987460	1811720	1811720	1811720	5781963	1811720		1411720			2004180		
								7685504		3498265	1019459	1713960	2103234	10403690	1576102

Ranger

...NEL & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

				1942	1943	YEAR 1942		1942 SHIPMENTS			1943 SHIPMENTS			
				To 11/30/41	1/1/42 to 4/8/42	4/9/42 to 11/30/42								
5068-9662	12493	10-20-39	38750											
	15236	9-5-40	27720											
	17354	11-25-40	48145											
	20731	4-21-41	33775											
	23590	8-18-41	96250											
— N	23963	9-4-41	155375	54250	1225	55475		54250	1225					
	24541	9-29-41	351400	201250		201250		201250						
— N	29509	2-5-42		20615	224750	245365		20615	224750					
— N	33154	4-13-42			159340	159340	100440		159340		100440			
— N	34905	5-21-42					62000					62000		
— N	36354	6-17-42					54095					54095		44640
— A	53667	8-26-43					44640							9145
— A	66184	9-21-43					9145							
	67018													
			1207345	1257140	385315	440053	1158935	654140	385315		100440	62095		453785
√069	12187	10-27-39	348870											
	15234	4-5-40	26250											
	17354	11-25-40	51700											
	20732	4-21-41	41360											
	23588	8-18-41	193400											
	24896	9-3-41	17296	211934		211934		211934						
	24942	9-29-41	377504	376		376		376						
— N	29475	2-5-42		89745	142755	232500		89745	142755					
— N	33155	4-3-42			81220	81220	159960		102218		159960			
— N	34906	5-11-42					62000					62000		
— N	36358	6-4-42					54250					54250		
— N	46921	11-27-42					15500					15500		
— A	52222	2-27-43					29340							29340
	67339													
			1254534	301303	584285	885588	570140	301303	544218		159960	139590		58680
6996-4-1-5	15590	8-31-40	28500											
	17563	12-3-40	113022											
	20733	4-21-41	84040											
	24543	9-29-41	28848											
— N	24744	9-29-41	301769											
— N	29618	2-9-42			22035	22035			22035					
— N	33443	4-17-42			366996	951796	128100		366996		128100			
— N	40723	8-15-42					95655					95655		
— A	52470	3-19-43					68277							68277
	67010						291681		389031		128100	95655		68277
							1158935		1044981		288060	234945		581785

ENGINEERING & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Diesel

					1942 to 11/30/41	1942 12/1/41 to 4/14/42	1942 4/15/42 to 4/30/42	1942 YEAR 1942	1943	SHIPPED AREA TO 4/14/42	SHIPPED AREA TO 4/30/42	1942 ON S.O. RECEIVED PRIOR TO 4/14/42	1942 ON S.O. RECEIVED AFTER 4/14/42	1942 LEND LEASE	1943 SHIPPED ON S.O. RECEIVED PRIOR TO 4/14/42	1943 SHIPPED ON S.O. RECEIVED AFTER 4/14/42	1943 LEND LEASE	
5158	11394	10-7-39	10710															
	14969	7-19-40	13600															
	17760	12-3-40	18700															
	20734	4-21-41	24508															
	23136	7-25-41	27968	2765		2765		2765										
	24444	9-29-41	8778	3730		3730		3730										
— N	24725	9-29-41	16933	10799		10799		10799										
— N	29501	2-6-42		8137	13509	9546		8137				13509						
— N	35571	5-19-42			46170	46170			107673				46170			107673		
— N	40430	8-13-42							273600							273600		
— A	54696	3-19-43							54639									54639
	64041																	
	67041																	
			118340	139431	59679	198911		485911	139431			13509	46170			381273		54639
5312	11316	10-7-39	16100															
	15792	8-31-40	34850															
	16951	10-9-40	37750															
	17557	12-3-40	81050															
	20941	4-28-41	115252															
	24117	9-9-41	176416															
	24525	9-29-41	100038															
LL N	32417	12-31-41		10570	42840	53410		10570	105570			46925		42840				
— N	33019	2-7-42		50080	42595	92675		50080										
LL N	33970	4-13-42			41800	41800								41800				
— N	40523	8-13-42				195130			488870				195130			488870		
— A	54697	3-19-43							703347									703347
			361450	60250	339335	600115		1171700	1192217	55080	105570	969525	241328	84640		488870		703347
5321	12053	10-23-39	171000															
	15342	9-5-40	149330															
	17510	12-3-40	648099	55186	94220	149406				55186		94220						
	23804	8-25-41		17660	52145	134050				67260		52145						
— N	24576	9-27-41			38000	38000						38000						
— N	29504	2-6-42			131765	131765						131765						
— N	21945	3-25-42			65740	65740			107065			65740				107065		
— N	36352	6-4-42							352830							352830		
— A	54698	3-19-43							129010									129010
	67340																	
			820448	78186	705385	1052515		1857900	1588097	122266	105570	301070	241328	84640		1070652		832357

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Ranger

			1942 to 11/30/41	1942 to 11/30/42	YEAR 1942	1943	1942 SHIPMENTS from Dealers	1942 SHIPMENTS to Dealers	1942 SHIPMENTS Agency to Dealers	1942 SHIPMENTS Agency Lease	1942 SHIPMENTS Lease	1943 SHIPMENTS Agency to Dealers	1943 SHIPMENTS Agency Lease	1943 SHIPMENTS Lease	
5830LLN	29947	2-2-42		302304	302304			302304							
LL N	33439	4-17-42		153780	153780						153780				
LL N	37931	7-2-42		408915	408915	75651					408915			75651	
	6519														
				302304	462695	75651		302304			562695			75651	
6472	11388	10-7-39	19212												
	14867	7-19-40	20800												
	16352	10-9-40	94920												
	17526	12-3-40	55370												
	20402	4-9-41	95715												
	23987	9-3-41	108327												
	24526	9-29-41	145307												
LL N	27707	12-29-41		100000	66000	166000		100000			66000				
— N	29502	2-6-42		68080	749720	1430000	68080		749720						
— N	33441	4-17-42			275550	275550	57750		275550			59250			
LL N	33935	4-29-42					72000							72000	
— N	40838	8-18-42					400000						400000		
— A	40793	3-8-43					530644								530644
			95447	168080	416647	1925550	1078444		1025270		627695	59250	400000	72000	530644
6571	62185	10-20-39	118550												
	15634	9-5-40	123750												
	17856	11-25-40	117000												
	20431	4-10-41	222750												
— — N	22640	7-8-41		523450	4775	523925		523450	4775						
	23523	8-15-41	14715	75600	37875	732250		75600	37875						
	25473	9-29-41	210300	18000		18000		18000							
— N	28211	2-5-42			844550	844550			844550						
— N	33264	4-14-42			2574	2574			2574						
— N	33307	9-30-42			11875	11875	131750			11875			131750		
— A	34719	3-19-43					117500								117500
	66811														
			969450	617050	1649775	3858425	2090094	617050	1467900	11875			1315750		1175500
								2731774	4128744	10433034	3555948	8151838	3620136	1813483	2409653

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Ranger

				To 11/30/41	12/1/41 to 4/1/42	4/2/42 to 11/30/42	Year 1942	1943	SHIPMENTS 1/1/41 to 11/30/42	LESS SHIPMENTS Prior to 1/1/41	1942 SHIPMENTS 1/1/41 to 11/30/42	AFTER 11/30/42	LESS LEASE	1943 SHIPMENTS Prior to 1/1/43	1943 SHIPMENTS 1/1/43 to 11/30/43	LESS LEASE	
6611	12189	10-20-39	118500														
	15633	9-5-40	92250														
	17357	11-25-40	117000														
	20424	4-10-41	222750														
— N	22110	8-25-41		526775	23275	550050			526775		23275						
— N	23524	8-25-41	72000	157950		157950			157950								
	24542	9-29-41	19395	48975		48975			48975								
— N	30442	2-5-42			898275	898275					898275						
— N	33765	4-14-42			947625	947625					947625						
— N	34356	6-4-42			19000	19000	1644400					19000			1644400		
— A	53827	8-9-43					87875										87875
	66758																
			811466	703660	1888175	2591835	5943750	703660		1869150	190				1644400		
6687	11389	10-6-39	36090														
	15581	2-18-40	247500														
	16354	10-9-40	179000														
	20841	4-24-41	80600														
	24129	9-9-41	222375	393200	258	393458			393200		258						
	24549	9-29-41	187055	132460		132460			132460								
— N	29606	2-9-42		112840	833105	945945			112840		833105						
LL N	32868	4-7-42			758485	758485	289304				758485					289304	
— N	33769	4-23-42			106470	106470	731261				106470			731261			
LL N	36991	6-15-42					720000									720000	
— N	40579	8-18-42					1312500								1312500		
T A	54693	8-29-43					769230										769230
	67703																
			715944	445840	1698118	2143958	2811730	446840	3958318	4178184	1335970	3741184	43513397	21111183	43513397	1009284	769230
6689	11390	10-7-39	10000														
	15762	9-21-40	12840														
	16300	10-9-40	85500														
	17558	12-3-40	49700														
	20735	4-21-41	20470														
	22111	9-9-41	91022														
	23138	7-25-41	39050														
	24550	9-29-41	71000														
— N	26246	2-12-42			147196	147196					147196						
LL N	27864	12-31-41			44080	44080							44080				
LL N	33436	4-17-42			37626	37626							37626				
			1185911		1885814								81706				

Ranger

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

1942 SHIFTS 4/1/42 to 11/30/42

1943 SHIPMENTS OR SIDE RECEIVED

			11/30/41	4/1/42 to 11/30/42	YEAR 1942	1943								
6711	17673	12-6-40	94000											
LL N	27861	12-31-41		103400	94000	197800		103400			0 94000			
LL N	33437	4-17-42			52647	52647	86743				0 52647	0 86743		
LL N	37348	6-30-42					410780					0 410780		
LL N	47515	12-9-42					60536					0 60536		
LL A	52010	2-16-43					53392					11 53392		
— A	69003	10-28-43					46995							46995
			94000	103400	146647	1180647	657446	103400			146647		611451	46995
6789	12668	11-22-39	9200											
	15593	8-31-40	11441											
	17565	12-3-40	22990											
	23137	7-25-41	23478											
	24476	9-9-41	13993											
	24551	9-29-41	20975											
— N	29511	2-6-42			47300	47300			47300					
— N	33404	4-17-42			104662	104662			104662					
— N	40424	8-13-42					187566					187566		
— A	54694	3-19-43					219868							219868
— N	66731	8-27-43					121188							121188
			141391		196154	196154	1196154		196154			187566		341056
7095	11391	1-7-39	6000											
	14965	7-19-40	9200											
	16356	10-9-40	47500											
	17554	12-3-40	26145											
	20432	9-10-41	37335											
	24128	9-9-41	34913	18810		18810		18810						
	24552	9-29-41	61750	6175		6175		6175						
— N	29752	2-12-42			29700	29700			29700					
— N	33868	4-25-42			61020	61020			61020					
— N	47280	12-4-42					203004					203004		
— A	53159	3-2-43					57814							57814
— A	61796	7-14-43					15110							15110
	66429		214391	18810	90820	1109610	1814954	18810	90820			203004		72924
								398330	516274	1360890	3741	2373329	435139	2150175

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Ranger — 1942

				to 11/30/41	12/1/41 to 4/15/42	4/16/42 to 11/30/42	YEAR 1942	1943	1942 Shipments Period to 4/15/42 Ship.	1942 Shipments Period to 4/15/42 Rec'd	1942 Shipments Period to 4/16/42 Ship.	1942 Shipments After 4/16/42 Ship.	1942 Shipments Lend Lease	1943 Shipments Period to 4/15/42 Ship.	1943 Shipments After 4/16/42 Ship.	1943 Shipments Lend Lease	
7102	11391	10-11-39		6400													
	14965	7-22-40		10400													
	16356	10-9-40		5300													
	17554	12-8-40		2746													
	20432	4-10-41		2275													
	24130	9-9-41		5658													
	24553	9-29-41		7293													
LL	N 27865	12-31-41			37400		37400			37400							
—	N 29758	2-12-42			23000	1200	24200		23000		17000						
LL	A 33866	4-25-42				18700	18700						18700				
—	N 33867	4-25-42				4500	4500	14800			4500				14800		
LL	N 37933	7-2-42				2920	2920	220400					2920			220400	
—	N 47314	12-5-42						200180							200180		
—	A 53247	3-1-43						100948									100948
—	A 61605	7-14-43						39657									39657
	65461			9711	50	1980	11740	377598	230	316	4670		4670	1470	200180	220400	140607
	66618																
	69017																
7104	11391	10-11-39		7326													
	14965	7-22-40		12000													
	16356	10-9-40		5300													
	17554	12-8-40		2915													
	20432	4-10-41		2947													
	24131	9-9-41		6635													
	24554	9-29-41		6890													
LL	N 27864	12-31-41			38135	2465	40600			38135			2465				
—	N 29759	2-12-42				33031	33031				33031						
LL	N 33784	4-28-42				34056	34056	10208					34056			10208	
—	N 33869	4-25-42				6958	6958	6907			6958				6907		
LL	N 37929	7-2-42						325148								325148	
—	N 47281	12-4-42						196388							196388		
—	A 53213	3-1-43						30547									30547
—	A 61704	7-14-43						13485									13485
	65493																
	66019																
	69441																
				16616	50	1980	11740	1196388	230	38135	10758		37521	1470	196388	325148	140607
									4006303	1918091	13750779	3741362	2924629	4373099	2189812	3256848	1406076

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

				1942 to 11/30/41	1942 11/30/41 to 4/18/42	1942 4/18/42 to 9/30/42	1942	1943	1942 SHIPMENTS PRIOR TO 4/18/42 ON SDJ REC'D	1942 SHIPMENTS 4/18/42 TO 11/30/42 ON SDJ REC'D	1942 PRIOR TO 4/18/42	1942 AFTER 4/18/42	1942 LEND LEASE	1943 PRIOR TO 4/18/42	1943 AFTER 4/18/42	1943 LEND LEASE	
7327	11392	15-7-39		1136.25													
	15591	8-31-40		875.40													
	16853	10-9-40		916.80													
	20405	4-9-41		924.40													
	22141	9-4-41		385.85	4764.31		4764.31			4764.31							
	24555	9-29-41		840.00													
— N	26244	2-5-42				16280.00	16280.00					16280.00					
LL N	29435	2-4-42			2481.22	1786.78	4268.00				2481.22		A 1786.78				
LL N	33438	4-17-42				11397.48	11397.48						A 11397.48				
— N	35336	5-16-42				18.54	18.54	25144.46				18.54			25144.46		
— N	40429	8-13-42						3846.50							3846.50		
LL N	42532	8-13-42				1713.84	1713.84	4573.96					A 1713.84			4573.96	
				4063.40	7025.53	44756.44	51781.97	107323.37	4764.31	4481.66	16280.00	18.54	30980.10		63605.96	4573.96	
7419	17440	11-28-40		1165.00													
LL N	27738	12-29-41				1027.53	1027.53						B 1027.53				
LL N	35305	5-28-42				640.75	640.75						B 640.75				
LL N	37346	6-20-42				186.40	186.40	4990.86					B 186.40			4990.86	
	62548			1165.00		1854.68	1854.68	4990.86					1854.68			4990.86	
	68417																
7467	15589	8-31-40		450.50													
	17524	9-3-40		252.50													
	20942	4-28-41		187.00													
	24127	9-9-41		107.64	305.87	1661.3	2224.70		305.87			1661.3					
	24556	9-30-41		115.25													
— N	29585	2-6-42				3349.50	3349.50					3349.50					
— N	33933	4-20-42				3550.05	3550.05	22.95				3550.05	?	?	22.95		
— N	34907	5-11-42						60.37							60.37		
— N	41151	8-22-42						1079.01							1079.01		
	61390			519.25	305.87	8579.05	8884.92	1162.33	305.87			8579.05			1162.33		
	68394																
									5070.18	4481.66	16280.00	8597.59	30980.10	4396.94	63605.96	9563.92	

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Prior to 1942 — SHIPS 1/1/42 TO 11/30/42 ON 5 D's REC'D — 1943 SHIPS ON 531 REC'D

				11/30/41	Jan 1/41 to 1/1/42	1942 to 11/30/42	1942	1943	SHIPPED Prior to 1/1/42	LL SHIPPED Prior to 1/1/42	Prior to 1/1/42	Apprn 1/1/42	Loss Sale	Prior to 1/1/42	1942 1/1/42	Cross Plate	
7673	17439	11-28-40		94000										43760 94	293 60 92		7 72 85 4
LL N	27263	12-31-41			900 52		900 52			900 52							
LL N	33794	4-20-42				17 50 20	17 50 20						8 17 50 20				
LL N	37347	6-20-42						4 12 2 84								4 12 2 84	
	67502																
				946 -	900 52	17 50 20	17 50 72	4 17 2 84		900 52			7 20 9 52			4 17 84	
7673	11293	10-7-39		10625													
	14002	7-19-40		10000													
	17761	12-3-40		17800													
	20945	4-28-41		30800													
	24552	9-29-41		24500													
— N	24757	10-1-41		48052													
— N	29510	2-6-42			40500		40500		40500								
— N	33766	4-14-42				67185	67185	22815			67185			22815			
— N	36355	6-4-42						166500							166500		
— A	42031	3-11-43						154260									154260
	66812																
				14480	405	67185	107685	343575	405 -		67185			22815	166500		154260
7674	12171	10-20-39		27000													
	15344	9-5-40		29670													
	17358	11-25-40		65780													
	20420	4-10-41		148278													
	23907	9-4-41		29690													
	24558	9-29-41		105754													
— N	26180	11-13-41			99300	2499900	2999200		49300		2999200	463310			201190		
— N	36357	6-4-42				463310	463310	201190							248320		
— N	40824	8-17-42						248320									
— A	47701	3-19-43						327250							208510		327250
	66950			633384	493 -	716410	716510	775760	493		299200 -	463310					327250
7672	21571	12-3-40		183348	469482	13890	455592		469482		13890						
	23506	8-25-41			1089000	968400	945740		1089000		962400						
— N	24654	9-27-41				1809000	1809000				1809000						
— N	29503	2-6-42				255600	255600				255600						
— N	31948	3-25-42				1384500	1384500	1432500			1384500			1432500			
— N	36358	6-4-42						629000							629000		
— A	43968	3-10-43						346200									346200
	67341			1833348	1558482	1078410	4787492	1111858	1558482		670410			14325 -	64910 -		673200
									6336873	929983	23155947	846883	5585249	585140	3622216		11516364
										1199183			A 6659134				

AIRCRAFT & DIESEL EQUIPMENT DIVISION
4401 Ravenswood Avenue
CHICAGO, ILL.

Ranges to 11/30/41

1942 SHIPTS 4/1/42 TO 11/30/42 ON SD's REC'D

1943 SHIPTS ON SD's REC'D

7812	11540	9-5-40	308560																115163.44
	13768	12-3-40	810725																
	23805	8-28-41	357120	1340780		1340780			1340780										
— N	24657	9-24-41		79600	393006	47.2625			79600			393025							
— N	29728	26-4-42			1447800	1447800						1447800							
— N	31843	3-25-42			1035500	1035500	660250					1035500				660250			
— N	34059	6-4-42					3495050										3495050		
— A	58059	8-3-43					1632100												1632100
	67943	C																	
		C	1085595	1340780	3163375	1147155	5787400	1340780			1763375					660250	3495050		1632100
7814	12247	10-20-39	38400																
	13597	3-18-40	78400																
	14623	6-21-40	86175																
	15599	9-[illegible]-40	160850																
	17562	[illegible]-[illegible]-40	310170																
	20404	[illegible]-[illegible]-41	377120																
	24133	9-2-41	952650		667200	667200						667200							
	24559	9-30-41		322490	28665	351145			322490			28665							
— N	29610	2-[illegible]-42			891210	891210	192150					891210				192150			
— N	33770	4-28-42			1015765	1015765	1031085					1015765				1031085			
— N	40628	8-[illegible]-42					3162750										3162750		
— A	55442	8-29-42					2343250												2343250
	66991		1485631	2340780	6784435	5243110	20781930	1340780	322490		1763375	6784435				1883400	6657800		4075350
7822	12495	10-20-39	944100																
	15644	9-[illegible]-40	307690																
	17573	[illegible]-[illegible]-40	1147244																
	23807	8-25-41	157210	1987850	2973360	1035510			798150			2373360							
	24653	9-29-41		1453850	4806540	3760370			1453850			4806540							
— N	29414	2-4-42			1433061	1433061						1433061							
— N	31944	3-25-42			3077798	3777798	1453850					3077798				1453850			
— N	34380	6-5-42					3822485										3822485		
A	53933	8-[illegible]-42					1871188												1871188
	67342		1611941	3441630	12290468	9236980	27481503	1340780	2252340		1763375	12290468				1453850	3822485		1871188
								8890427	9999830	30244958	8421888	64129279	91887246	46702387	9[illegible]4	[illegible]	[illegible]		17362907

Ranger

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

				11/30/41	to 12/31/42	1942	YEAR 1942	YEAR 1943	SHIPPED [illegible]	[illegible]	1944 SHIPTS 4/1/44 to 11/1/44 ON SDs RECD	[illegible]	1945 SHIPTS ON SDs RECD	[illegible]	LEND LEASE	
7824	12182	10-24-39	101600										9187.24	4476.2387		173.2950
	15341	9-5-40	120750													
	17619	12-4-40	68715													
	23808	8-25-41	77910	331785	544575	876360			331785		544575					
	24652	9-27-41		127200	258375	385575			127200		258375					
— N	29506	2-6-42			1093970	1093920					1093970					
— N	31947	3-25-42			145485	145485					145485					
— N	36392	6-5-42			24000 90	24000 90	2283970					24000 90		2283970		
— A	3976	3-9-43					1963650									1963650
	67415	—														
				4987385	4469855	3591110	8059965	4467370	4987385		3351770	24000 90		2283970		1963650
7825	12205	10-20-39	191600													
	15639	9-5-40	27426													
	17574	12-2-40	66736	588353		588353			588353							
	23809	8-25-41		1518340	797440	2315780			1518340		797440					
	24651	9-27-41		427200	404060	831260			427200		404060					
— N	29413	2-4-42			2454360	2454360					2454360					
— N	31946	3-25-42			3070500	3070500					3870500					
— N	36393	6-5-42			1011040	1011040	5285355					1011040		5285355		
— A	3932	3-10-43					218070									218070
	67413	—														
				1133540	7338895	7472400	8611040	1076410	7338895		6797360	1011040		5285355		218070
7826	12207	10-20-39	127600													
	15638	9-5-40	20386													
	17567	12-3-40	44339	488538		488538			488538							
	23864	9-4-41		74140	908520	1622000			74140		908520					
	24650	9-27-41		270000	188300	458300			270000		188300					
— N	29507	2-6-42			2058750	2058750					2058750					
— N	31484	3-16-42			1679400	1679400	845100				1679400		845100			
— N	36394	6-5-42					530965							530965		
— A	3931	3-10-43					218970									218970
	68420															
				1335140	1467855	2802995	1594935		1335140		6092950		845100	530965		218970
									13360840	9018325	6432360	1011040	845100	5816107		2196420

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Ranger to 1942

			11/30/41	[illegible]	[illegible] to 11/30/42	1942	1943	SHIPPED TO 4/28/42	LL SHIPPED PRIOR TO 4/28/42	SHIPMENTS 4/28/42 TO 11/30/42 ON S.D. RECEIVED PRIOR TO 4/28/42	AFTER 4/28/42	LEND LEASE	SHIPMENTS ON S.D.S. RECD PRIOR TO 4/28/42	AFTER 4/28/42	LEND LEASE	
7827	12210	10-20-39	527600					13550648	[illegible]	[illegible]	[illegible]	[illegible] 6659 34	10033824	60101497		287343 22
	15637	9-5-40	157710													
	17566	12-3-40	440086	302653		302653		302653								
	24083	9-8-41		1024600	379525	1404125		1024600		379525						
	24649	9-26-41		258500	287875	546375		258500		287875						
— N	29412	2-4-42			1796575	1796575				1796575						
— N	31947	3-25-42			1415875	1415875	780200			1415875			780200			
— N	36391	6-5-42					4107800							4107800		
— A	52226	2-17-43					1978700									1978700
	67424															
			7[illegible]396	1585753	3879850	5465603	6866700	1585753		3879850			7802[illegible]	41078[illegible]		19787[illegible]
7975	23043	7-30-41	163724	82716	1372	81344		82716		1372						
— N	25159	10-14-41		620310	1042840	1663150		620310		1042840						
	39805				420360	420360	228780				420360			228780		
— N	42607	9-15-42					743380							743380		
— N	49007	12-30-42					1178930							1178930		
— A	61060	7-3-43					959070									959070
— A	65341	9-8-43					364160									364160
			163724	703026	1461838	2164854	3474320	703026		1041468	420360			2151090		1323[illegible]
8123	23043	7-30-41	229416	12584	726	11858		12584		726						
— N	25160	10-14-41		672080	853120	1525200		672080		853120						
	39805				415090	415090					415090					
— N	42607	9-15-42			19530	19530	723540				19532			723540		
— N	49022	12-30-42					1244032							1244032		
— A	61057	7-5-43					1120040									1120040
— A	65310	9-8-43					175040									175040
	69866															
			229416	684662	1487014	1471678	3262[illegible]	684662		852396	434622			1967[illegible]		1[illegible]
								16324091	929983	51306972	2948140	[illegible]	10814024	68327959	[illegible]	30931332

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

SHIPMENTS 4/1/42 to 11/30/42 ON SDS RECEIVED

Page 6

				TO 11/30/41	12/1/41 TO 3/31/42	4/1/42 TO 11/30/42	YEAR 1942	1943	SHIPPED TO 4/1/42	SHIPPED 4/1/42 TO 11/30/42	PRIOR TO 4/1/42	AFTER 4/1/42	LEND LEASE	PRIOR TO 4/1/42	AFTER 4/1/42	LEND LEASE	
									163,240.91	923.83	130,697.71	24,811.40	A 6,579.34	108,114.44	68,329.89		309,318.32
8124	17200	9-3-40	3 09.47														
	17359	11-25-40	372.90														
	18406	4-8-41	65.34														
	24760	9-29-41	93.14	26.40			26.40		26.40								
— N	24778	10-1-41	102.40	86.85			86.85		86.85								
— N	29607	2-9-42			127.66		127.66				127.66						
— N	32514	11-1-42		9.18			9.18			9.18							
— N	33442	4-17-42			193.99		193.99				193.99						
— N	40601	8-13-42			2.27		2.27	214.12				2.27			214.12		
— A	59176	6-2-43						21.43									21.43
	66643																
			33.41	9.63	3.23	1.07	4.30	2.15	9.63		3.31	.33			2.14		2.15
8301	17703	12-4-40	5.83														
	17704	12-6-40	37.10														
	20432	4-10-41	5.83														
	24132	9-9-41		6.52			6.52		6.52								
	24761	9-29-41	7.44	5.62			5.62		5.62								
LL N	27864	12-31-41		16.71	2.23		3.90						B 2.23				
— N	29611	2-9-42		29.40	4.01		6.95		2.94		4.01						
— N	33870	4-25-42			14.32		14.32				14.32						
LL N	33871	4-25-42			2.77		2.77						B 2.77				
LL N	37632	7-2-42			10.44		10.44	2.66					A 10.44			2.66	
— N	47315	12-4-42						4.30							4.30		
— A	53158	8-2-43						44.54									44.54
— N	61606	7-14-43						.40									.40
	64014																
	66620																
	69018																
			1.51	1.67	3.79	1.53	5.33	11.83	1.50	1.67	1.33		1.77		.40	.27	.49
8350	23043	7-30-41	12.20														
	25161	10-14-41		3.17			3.17		3.17								
	39505			29.26	6.59	9.52			2.92		6.59						
					3.36	3.36						3.36					
— N	47607	9-15-42			1.45	1.45		3.42				1.45					
— N	49048	12-30-42						.62							3.42		
— A	61058	7-3-43						3.20							.62		
— A	65311	9-8-43						2.09									3.20
	69798																2.09
			1.22	3.22	1.18	1.90	3.17	1.18	3.17		1.18	.45			.96		.47
									177.38	94.79	42.93	33.21	7.63	1.08	87.99	2.96	34.09
																	15.69

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Ranger

			to 11/30/41	12/1/41 to 4/28/41	4/29/41 to 11/30/42	YEAR 1942	1943	SHIPPED PRIOR TO 4/28/42	LL SHIPPED PRIOR TO 4/28/42	SHIPMENTS 4/28/42 TO 4/30/42 ON SD'S REC'D PRIOR TO 4/28/42	SHIPMENTS 4/28/42 TO 4/30/42 ON SD'S REC'D AFTER 4/28/42	LEND LEASE	SHIPMENTS ON SD'S REC'D PRIOR TO 4/28/42	SHIPMENTS ON SD'S REC'D AFTER 4/28/42	LEND LEASE	
8381	23043	7-30-41	122000	8296		8296		17733832 8296	9466	5736	3321	8003	108140	718668		3409091
— N	25162	10-14-41		349680	527900	877580		349680		527900						
	39205				343790	343790					343790					
— N	42607	9-15-42					399590							399590		
— N	48942	12-30-42					314650							314650		
— A	61059	7-3-43					640000									640000
— A	65293	9-8-43					348800									348800
	69798															
	378709		122000	357976	871690	1229666	1703040	357976		527900	343790			714240		988800
8625	21980	6-9-41	473000													
LL N	27801	12-31-41		18920		18920			18920							
LL N	33865	4-25-42			88838	88838						88838				
			473000	18920	88838	107758			18920			88838				
8154 LL N	38893	7-15-42					247100								247100	
8209 LL N	38889	7-15-42			237320	237320	403095					237320			403095	
					237320	237320	403095									
8919 LL N	38815	7-14-42				414900	966161									
LL N	38816	7-14-42				414900	1146902					414900			966161	
LL A	57487	5-5-43					3213998								1146902	
															3213998	
						414900	5329061					4149			5329061	
6695 LL N	38712	7-15-42			224250	224250						224250				
LL N	38996	7-15-42			282750	282750	441350					282750			441350	
					507000	507000	441350					507000			441350	
7902 LL N	39555	7-25-42					205865								205865	
	65148															
	70140															
								18091808	965619	55894142	3665570	5731551 1959554 761130	108140	7258109	3862555 1329196 3267390	3507979

Ranges

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

SHIPMENTS SHIPPED TO U.S.N. — SHIPMENTS ON S.D. RECEIVED

| | | |

[fol. 408] IN UNITED STATES DISTRICT COURT

[File endorsement omitted]

[Title omitted]

AFFIDAVIT OF B. CH. KELLEHER IN RESPECT OF GENERAL MOTORS CORPORATION (BUICK DIVISION)—Filed July 2, 1945.

B. Ch. Kelleher, being first duly sworn on oath, deposes and says that he is now and has been since June 1940, the President and General Manager of Aircraft & Diesel Equipment Corporation; that this affidavit pertains only to the relations of Aircraft & Diesel Equipment Corporation, (hereinafter called "Plaintiff"), with Buick Motor Division of the General Motors Corporation, (herein called "Buick"), and is one of a series of affidavits made by this affiant pertaining to the contracts of Plaintiff with purchasers of its equipment; that affiant makes this affidavit and makes a part hereof certain exhibits in support of the position of plaintiff that a substantial portion of its sales made in the fiscal years ended November 30, 1942, November 30, 1943, and November 30, 1944, are not subject to renegotiation.

[fol. 409] Affiant further states that:

(1) The photostatic copies of letters and telegrams attached to this affidavit are all true and correct copies of letters or telegrams sent by Buick to Plaintiff, or by Plaintiff to Buick; that the computation, a true and correct photostatic copy of which is attached hereto, has been made, under the supervision of affiant, by auditors furnished by Lybrand, Ross Bros. & Montgomery, certified public accountants, from the books of original entry kept and maintained by Plaintiff in the ordinary course of business, and that affiant believes all of said computation to be correct.

(2) In his opinion Plaintiff had a contract with General Motors Corporation acting through Buick for the purchase of aircraft parts on March 22, 1941, and at all times thereafter; that said contract was not subject to renegotiation by reason of any subsequently enacted statute; and that the basis of said opinion of said affiant is as hereinafter set forth.

(3) That a few weeks prior to March 10, 1941, Plaintiff received from Buick certain blueprints, showing parts of said aviation engines, with a request to Plaintiff to submit quotations as to price or prices at which Plaintiff could furnish said parts together with terms and conditions applicable to such quotations. Pursuant to such request, on March 10, 1941, this affiant caused to be mailed to Buick a letter, dated March 10, 1941, a copy of which is attached to the affidavit and marked "Exhibit B-1", wherein Plaintiff quoted prices on the nineteen parts for aviation engines therein set forth.

[fol. 410] (4) Thereafter on or about March 22, 1941, Plaintiff received from Buick its purchase orders Nos. 762, 764, 765, 769, 770, 771, 772, 773, 774, 777, 779, 780, 781, 782, 783 and 786 for a quantity of parts for said aviation engines identified as parts Nos. 1177, 16429, 20140, 20297, 23145, 23365, 24160, 24163, 24164, 25856, 25689, 34224, 37035, 39028, 39899 and 47793, the same being a portion of the parts upon which Plaintiff had quoted prices on March 10, 1941, as evidenced by Exhibit B-1.

(5) Upon receipt of said purchase orders as aforesaid, Plaintiff acknowledged said orders and requested delivery dates, additional specifications and necessary steel for the completion of said contract by the letter of Plaintiff to Buick, dated March 22, 1941, a copy of which is attached hereto as "Exhibit B-2".

(6) Thereafter on April 30, 1941, Plaintiff received from Buick its letter of April 30, 1941, advising Plaintiff that Buick's aviation order had been doubled, and that Buick's schedule to Plaintiff for a period beginning in September 1941 and ending December 1941 and beginning in January and ending in August 1942 was as attached to said letter; that in addition to meeting said schedule Plaintiff was required to base its calculations on a fifteen to twenty per cent increase for spares and scrap. It requested Plaintiff to immediately advise Buick as to Plaintiff's ability to meet said increased schedules. A copy of said letter of April 30, 1941, and the "Revised Shipping Schedule" attached to said letter are marked "Exhibit B-3" and "Exhibit B-3a", and are attached sheets made a part of this affidavit. Said shipping schedule lists the same parts set forth in plaintiff's quotation dated March 10, 1941, and the difference being only the increased requirements.

(7) Thereafter on May 1, 1941, Plaintiff advised Buick of its ability to meet said increased delivery schedule, as is shown by Plaintiff's letter to Buick dated May 1, 1941, [fol. 411] a copy of which is attached hereto and marked "Exhibit B-4."

(8) Thereafter on or about December 31, 1941, Plaintiff received from Buick its letter of December 31, 1941, outlining Buick's schedule as received from Washington for December 1941, for the entire year 1942, and for the months of January to September 1943, "and the months following at the September monthly rate for the duration." Said letter also advised that:

> "• • • in addition to a sufficient number of parts to meet this engine schedule, you (Aircraft & Diesel Equipment Corporation) will be required to supply whatever may be necessary in the way of pieces to take care of the spare parts program." (Parentheses added.)

said letter also requested Plaintiff to advise what increased facilities it would require to take care of the program and whether Plaintiff would be able to do so; a copy of which said letter of December 31, 1941 from Buick to Plaintiff is attached hereto as "Exhibit B-5".

(9) Following the receipt of said letter of December 31, 1941, aforesaid Exhibit B-5, Plaintiff advised Buick on January 3, 1942, that it needed no additional facilities to take care of the increased schedule, and would improve its shop production schedules for early deliveries, a copy of which said letter dated January 3, 1942, is attached hereto as "Exhibit B-6".

(10) On or about January 10, 1942, Plaintiff received a letter from Buick, advising that the schedule of deliveries had again been changed, and setting forth a new schedule of engine requirements for December 1941, the entire calendar year 1942, and the months of January to September, both inclusive, of 1943, and continuing at the September 1943 schedule "for the duration of the emergency". Said letter of January 10, 1942, also advised plaintiff as follows:

> [fol. 412] "We appreciate that the orders you have at the moment do not cover this schedule, however additional orders are in the process of preparation and your immediate reply as to your ability to take care of us will be greatly appreciated, so that there

will be no delay in forwarding these orders to you when they are ready, which we expect will be within the next week.

"Please arrange all other conditions referred to in our original letter as they still apply and we would appreciate hearing from you promptly relative to this revised schedule."

A copy of said letter of January 10, 1942, is attached hereto and marked "Exhibit B-7".

(11) Thereafter on January 17, 1942, Plaintiff acknowledged said letter of January 10, 1942, "Exhibit B-7" and accepted said increased delivery schedule, a copy of which said letter of January 17, 1942, is attached hereto as "Exhibit B-8".

(12) Thereafter on March 16, 1942, Plaintiff received a letter from Buick advising Plaintiff that Buick had accepted a contract from the Air Corps for an additional 3,000 engines per month beginning June 1943 and from that point on for the duration; that in and by said letter Buick advised plaintiff the parts numbers and the percentage of spares which Plaintiff would be obliged to furnish Buick in order to comply with the said schedule, a copy of which said letter and schedule is attached hereto as "Exhibit B-8a".

(13) Thereafter on March 20, 1942, Plaintiff received a telegram from Buick advising that the engine building program had been increased from 2,000 to 3,000 engines per month, and advising Plaintiff of Buick's monthly requirements from Plaintiff. It also requested Plaintiff to advise Buick if it needed additional equipment to take care of the scheduled production, a copy of which said telegram is attached hereto as "Exhibit B-9".

[fol. 413] (14) On March 21, 1942, Plaintiff replied to said telegram aforesaid "Exhibit B-9" accepting Buick's proposition relating to said increased requirements. It also requested four pieces of machinery to facilitate said deliveries. A copy of said letter of March 21, 1942, is attached hereto as "Exhibit B-10".

(15) On or about April 14, 1942, Plaintiff received a letter from Buick advising that the four machines requested would be forthcoming, and again requesting confirmation of Plaintiff's ability to meet said increased schedule, a

opy of which said letter and schedule are attached as "Exhibits B-11" and "Exhibit B-11a".

(16) On April 16, 1942, Plaintiff advised Buick that it as prepared to meet said increased schedule with the additional machinery furnished. A copy of said letter of April 6, 1942, is attached hereto and marked "Exhibit B-12".

(17) Said additional machinery was received and said elivery schedules maintained.

(18) On July 7, 1942, Plaintiff received from Buick a tter, relative to schedules for the balance of the year 1942, nd the year 1943, showing Buick's requirements during aid period. A copy of said letter and schedules is attached ereto as "Exhibit B-13" and "Exhibit B-13a", which said hedules Plaintiff accepted as shown by its letter to Buick ated July 14, 1942, a copy of which is attached hereto as Exhibit B-14".

(19) Following the receipt of Buick's letter dated December 31, 1941, and following other letters or telegrams hereafter sent to Plaintiff by Buick, increasing requirements of Buick for the parts then being made by Plaintiff, his affiant made or caused to be made (a) shop surveys [Vol. 414] showing work in production, and prior orders (b) machinery on hand, and (c) personnel, and made such anges in production schedules, machinery and personnel was necessary to insure Plaintiff's being able to perform s contracts for the parts being manufactured for Buick in e increased amounts and in accordance with its requirements; that as said increases were made Buick supplied laintiff with steel necessary to do the necessary work to nform to said schedules. Affiant says Buick relied upon aintiff to supply the parts then being made by Plaintiff r Buick, in amounts necessary to meet said increased requirements in accordance with the agreement dated March , 1941, as modified in respect of augmented requirements, evidenced by various Exhibits attached hereto.

(20) On December 19, 1942, Plaintiff received from Buick letter with enclosures regarding renegotiation, a copy which said letter of December 19, 1942, and enclosures, e attached hereto and marked "Exhibit B-15"; that pursant to Buick's letter of December 19, 1942, Plaintiff gned and returned to Buick the copy of such letter as requested by Buick. Affiant further says that on December

19, 1942, and immediately after the passage of the Sixth Supplemental National Defense Appropriation Act on April 28, 1942, he was advised and from his own examination of Section 403, he concluded that Section 403 thereof was unconstitutional and void. Affiant still believes that it is unconstitutional and void.

As to any business transacted in the fiscal year ended November 30, 1943, affiant says that no renegotiation pursuant to the provisions of Section 403 of the Sixth Supplemental National Defense Appropriation Act has ever been attempted by anyone; nor, has there ever been any attempt by anyone ever to renegotiate any of the business or contracts of the Plaintiff in accordance with the provisions of the agreement made with Buick. On the contrary the renegotiation conducted by the War Contracts Price Adjust-
[fol. 415] ment Board was and is wholly outside of the purview of the agreement in respect of renegotiation which Plaintiff returned to Buick. In any event said letter of December 19, 1942, did not authorize, direct or permit renegotiation of any sales made in the year 1943, under the terms and provisions of the Renegotiation Act adopted February 24, 1944, which said Act this affiant also believes to be unconstitutional and void.

Further affiant sayeth not.

B. Ch. Kelleher.

Subscribed and sworn to by me this 29th day of June, A. D., 1945.

Clyde F. DeWitt, Notary Public (Notarial Seal).

(Here follow 4 photolithographs, side folios 416-419)

March 10, 1941

General Motors Corporation
Buick Motor Division
Aviation Engine Plant
Flint, Michigan

Attention: Mr. L. Stewart

Gentlemen:

We are pleased to submit the following quotations on the parts for which prints were left with us a few weeks ago.

Part A-37035 - Valve

Buick to furnish 450 feet of 1 1/16 Rd. material without cost to Adeco.
Lot 2000 pieces
Price. . . . . $ .79 each
Tools additional. $205.00

Part A-24163 - Pipe

Buick to furnish 530 feet of 3/16 OD X 7/16 ID tubing without cost to Adeco.
Lot 2000 pieces
Price. . . . . $ .17 each
Tools additional. . . . . $ 15.00

Part A-25856 - Shaft

Buick to furnish 460 feet of 5/8 Rd. material without cost to Adeco.
Lot 2000 pieces
Price. . . . . $ .34 each
Tools additional. $130.00

Part A-39899 - Dowel

Buick to furnish 250 feet 5/8 Rd. material without cost to Adeco.
Lot 4000 pieces
Price. . . . . $ .06 each
Tools additional. . . . . $ 25.00

J 6803
2614 #
OK

Part A-26689 - Spacer

Buick to furnish 950 feet of 11/16 Rd. material without cost to Adedo.
Lot 20,000 pieces
Price. . . . . $ .06 each
Tools additional. $115.00

Part A-33785 - Tappet Valve

Buick to furnish 28,000 feet of 7/8 Rd. material without cost to Adeco.
Lot 56,000 pieces
Price. . . . . $ 1.20 each
Tools additional. $680.00

out

J 6809
88 #
OK

Part A-24160 - Plate

Buick to furnish 32 feet 5/8 Rd. material without cost to Adeco.
Lot 2000 pieces
Price. . . . . $ .05 each
Tools additional. . . . . $ 15.00

J 6802
1485 #
OK

Part A-1177 - Insert

Buick to furnish 540 feet of 3/8 Rd. material without cost to Adeco.
Lot 4000 pieces
Price. . . . . $ .30 each
Tools additional. . . . . $ 30.00

Part A-20495 - Body

OK

Buick to furnish 290 feet of /8 Rd. material without cost to Adeco.
Lot 2000 pieces
Price. . . . . $ 1.08 each
Tools additional. $405.00

OUT
THRD
MUST BE
GROUND

Part A-18350 - Plunger

X

Buick to furnish 190 feet of 1/2 sq. material without cost to Adeco.
Lot 2000 pieces
Price. . . . . $ .43 each
Tools additional. . . . . $ 95.00

out

258

J-6804 907# OK

Part A-23145 - Spacer

Buick to furnish 330 feet of 9/16 Rd. material without cost to Adeco.
Lot 14,000 pieces
Price. . . . . $ .08 each
Tools additional. . . . . $ 30.00

J-6807 523# OK

Part A-24164 - Shaft

Buick to furnish 190 feet of 3/16 Rd. material without cost to Adeco.
Lot 2000 pieces
Price. . . . . $ .29 each
Tools additional. . . . . $ 65.00

J-6800 √500# OK

Part A-23365 - Pipe

Buick to furnish 2000 feet of [redacted] 7/32 O.D. [redacted] X 1/8 I.D. tubing without cost to Adeco.
Lot 8000 pieces
Price. . . . . $ .16 each
Tools additional. . . . . $ 45.00

J-6815 990# OK

Part A-16429 - Pipe

Buick to furnish [redacted] 360 feet of [redacted] 29/64 O.D. [redacted] X 3/8 I.D. tubing without cost to Adeco.
Lot 2000 pieces
Price. . . . . $ .05 each
Tools additional. . . . . $ 15.00

J-6801 1045# OK

Part A-20140 - Pipe

Buick to furnish 380 feet of 7/32 O.D. X 1/8 I.D. tubing without cost to Adeco.
Lot 4000 pieces
Price. . . . . $ .05 each
Tools additional. . . . . $ 15.00

J-6814 OK 633#

Part A-34224 - Pin

Buick to furnish 230 feet of 3/8 Rd. material without cost to Adeco.
Lot 2000 pieces
Price. . . . . $ .05 each
Tools additional. . . . . $ 30.00

J 6817 798 BK

Part A-39028 - Dowel

Buick to furnish 290 feet of ~~3/8~~ 11/32 Rd. material without cost to Adeco.
Lot 4000 pieces
Price. . . . . $ .05 each
Tools additional. . . . . $ 30.00

J 6805 2337 OK

Part A-20297 - Pin

Buick to furnish 850 feet of 7/16 Rd. material without cost to Adeco.
Lot 12,000 pieces
Price. . . . . $ .08 each
Tools additional. $105.00

J 6810 853 OK

Part A-47793 - Plug

Buick to furnish 310 feet of 3/8 Rd. material without cost to Adeco.
Lot 2000 pieces
Price. . . . . $ .05 each
Tools additional. . . . . $ 15.00

Delivery promises are based on normal expectancy. Acts or demands of the United States Government, fires, strikes, accidents to machinery or other causes unavoidable or beyond our control, or the failure to fill orders accepted. This quotation and delivery promise is subject to change which may be caused by orders which are now pending and which may be scheduled for shop production if received before this order. It supersedes all previous quotations or agreements.

Cancellation of orders can be made only with our consent and upon terms that will indemnify us against loss.

Any quantity up to 10% in excess of or less than the quantity ordered will be regarded as completing same.

The cost of any changes in design or specifications required by the purchaser is chargeable to the purchaser.

We trust that we may have the opportunity of serving you, and remain,

Very truly yours,

AIRCRAFT & DIESEL EQUIPMENT CORPORATION

L. C. Simmons
Sales Department

LCS/rf

2580

[fol. 420] EXHIBIT B-2

March 22, 1941

Buick Motor Division, Aviation Engines Plant, Building #85, Flint, Michigan.

Attention: Mr. B. W. Stickney.

Gentlemen:

We wish to acknowledge with thanks your orders #762, 764, 765, 769, 770-1-2-3-4, 777, 779, 790-1-2-3 and 786.

We are enclosing herewith our purchase orders for the material necessary for these orders. Will you please advise us your best delivery dates for this material so that we may guide our production department accordingly.

In order that we may tool this job, will you kindly send us two copies each of the physical specifications #3 for part #23145 and 2A for part #24164 also 2 copies each of the following material specifications:

PWA	#193	Steel	PWA	#824	Steel
"	815	"	"	132	Alum.
"	178	"	"	173	Steel Tubing.
"	801	"	"	174	" "
"	187	"			

Again we wish to thank you for these orders and the opportunity of serving you.

Very truly yours, Aircraft & Diesel Equipment Corporation; L. G. Simmons, Sales Department.

rf

[fol. 421] "EXHIBIT B-3"

Aviation Engine Plant, Buick Motor Division
General Motors Corporation, Flint, Michigan

April 30, 1941

Aircraft & Diesel Equipment Corporation, 4401 No. Ravenswood Avenue, Chicago, Illinois.

Gentlemen:

Our aviation engine order has now been doubled and our schedule to you will be as attached, and in addition to this schedule, you must figure on 15% to 20% for spares and scrap.

You will please make a survey immediately and advise at once as to your ability to meet this increased schedule.

Your prompt attention and a reply will be appreciated.

Very sincerely yours, Aviation Engine Plant, Buick Motor Division, General Motors Corporation, B. Wm. Stickney, Ass't. Dir. of Purchases.

[fol. 422]

"Exhibit 3-A"

Aircraft and Diesel Equipment Corp.

Revised Shipping Schedule, April 30, 1941

1942

Pur. Order	Part No.	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	April	May	June	July	Aug.
P 765	1177	66	150	350	550	800	900	950	1050	1200	1400	1600	1800
P 786	16429	33	75	175	275	400	450	475	525	600	700	800	900
P 764	20140	66	150	350	550	800	900	950	1050	1200	1400	1600	1800
P 771	20297	198	450	1050	1650	2400	2700	2850	3150	3600	4200	4800	5400
P 770	23145	231	525	1225	1925	2800	3150	3325	3675	4200	4900	5600	6300
P 762	23365	132	300	700	1100	1600	1800	1900	2100	2400	2800	3200	3600
P 777	24160	33	75	175	275	400	450	475	525	600	700	800	900
P 774	24163	33	75	175	275	400	450	475	525	600	700	800	900
P 773	24164	33	75	175	275	400	450	475	525	600	700	800	900
P 772	25856	33	75	175	275	400	450	475	525	600	700	800	900
P 769	26689	330	750	1750	2750	4000	4500	2750	5250	6000	7000	8000	9000
P 783	34224	33	75	175	275	400	450	475	525	600	700	800	900
P 782	37035	33	75	175	275	400	450	475	525	600	700	800	900
P 781	39028	66	150	350	550	800	900	950	1050	1200	1400	1600	1800
P 780	39899	66	150	350	550	800	900	950	1050	1200	1400	1600	1800
P 779	47793	33	75	175	275	400	450	475	525	600	700	800	900

The months following August are the same as quantities for August.

[fol. 423] EXHIBIT B-4

May 1, 1941.

Aviation Engine Plant, Bldg. #85, Buick Motor Division,
Flint, Michigan.
Attn: Mr. B. Wm. Stickney, Ass't. Dr. of Purchases.
Gentlemen:

In response to your letter of April 30, 1941, we wish to advise you that we are in a position to meet your increased schedule, this however depends upon your ability to deliver the material to us without delay.

Your prompt delivery of the material will be appreciated and we shall make ever' effort to keep the delivery schedules up to date.

Yours very truly, Aircraft & Diesel Equipment Corporation; L. G. Simmons, Sales Department.

LGS:R

[fol. 424] EXHIBIT B-5

Buick Motor Division, General Motors Corporation
Aviation Engine Plant, Melrose Park, Ill.

December 31, 1941

Aircraft & Diesel Equipment Corp., 4401 N. Ravenswood Avenue, Chicago, Illinois.
Attention: Mr. L. G. Simmons.
Gentlemen:

Referring to our wire of December 11, 1941 concerning instructions from Washington, we give you below our schedule as it has been outlined to us.

Thru	Dec.	558	engines	1943	Jan.	1225 engines
1942	Jan.	400	"		Feb.	1350 "
	Feb.	450	"		Mar.	1475 "
	Mar.	450	"		Apr.	1475 "
	Apr.	450	"		May	1625 "
	May	500	"		June	1775 "
	June	550	"		July	1900 "
	July	600	"		Aug.	2000 "
	Aug.	700	"		Sept.	2000 "
	Sept.	800	"			
	Oct.	900	"			
	Nov.	1000	"			
	Dec.	1100	"			

and the months following will be at this rate for the duration.

In addition to a sufficient number of parts to meet this engine schedule, you will also be required to supply whatever may be necessary in the way of pieces to take care of the spare parts program, which will be given you later. [fol. 425] We want you to make an immediate survey and advise us at once what, if anything in the way of increased facilities will be required by you to take care of this program, also whether or not you will be able to do so.

Your early attention and a prompt reply is essential.

Very truly yours, Aviation Engine Plant, Buick Motor Division, General Motors Corporation; B. Wm. Stickney, Ass't. Dir. of Purchases.

BWS:ab

[fol. 426] EXHIBIT B-6

Jan. 3, 1942.

Buick Motor Division, Aviation Engine Plant, Melrose Park, Illinois.

Attention—Mr. R. Wm. Stickney, Ass't. Dir. of Purch.

Gentlemen:

In response to your letter of December 31, 1941, with reference to the instructions given you from Washington regarding delivery schedules, please be advised that in no way will we be in need of any increased facilities to take care of the program as outlined in your letter.

You may be assured of our best cooperation, and whenever possible, we will improve our shop production schedules for early deliveries.

Very truly yours, Aircraft & Diesel Equipment Corporation; L. G. Simmons, Sales Manager.

[fol. 427] EXHIBIT B-7

Buick Motor Division, General Motors Corporation
Aviation Engine Plant, Melrose Park, Ill.

January 10, 1942

Aircraft & Diesel Equipment Corp., 4401 N. Ravenswood Avenue, Chicago, Illinois.
Attention: Mr. L. G. Simmons.

Gentlemen:

Referring to our letter of December 31, 1941, outlining to you our engine schedule as requested by Washington, this has now been changed and information given us yesterday by Major Ervine and Major Osborne necessitates our changing the figures in our letter of the above date, so that they are as follows:

			Accumulative
Thru	Dec.	558 engines	
1942	Jan.	400	958
	Feb.	450	1408
	Mar.	450	1858
	Apr.	450	2308
	May	500	2808
	June	550	3358
	July	600	3958
	Aug.	700	4658
	Sept.	800	5458
	Oct.	1100	6558
	Nov.	1200	7758
	Dec.	1300	9058
1943	Jan.	1400	10458
	Feb.	1500	11958
	Mar.	1600	13558
	Apr.	1700	15258
	May	1800	17058
	June	1900	18958
	July	2000	20958
	Aug.	2000	22958
	Sept.	2000	24958

and for anything we know now, so on for the duration of the emergency.

[fol. 428] We appreciate that the orders you have at the moment do not cover this schedule, however additional

orders are in the process of preparation and your immediate reply as to your ability to take care of us will be greatly appreciated, so that there will be no delay in forwarding these orders to you when they are ready, which we expect will be within the next week.

Please arrange all other conditions referred to in our original letter as they still apply and we would appreciate hearing from you promptly relative to this revised schedule.

Very truly yours, Buick Motor Division, General Motors Corporation; B. Wm. Stickney, Ass't. Dir. of Purchases.

BWS:ab

[fol. 429] EXHIBIT B-8

Buick Motor Div., Aviation Engine Plant, Melrose Park, Illinois.

Attention—Mr. B. Wm. Stickney.

Gentlemen:

In response to your letter of January 10, 1942, with reference to increase in your engine schedule, we are pleased to advise you that at this writing we can see no reason why we would not be able to meet the delivery schedule as outlined in your letter.

While we are not taking on any new accounts, we are making every possible effort to serve our own customers and we are endeavoring to approximate their needs in the coming year so that we will be in a position to serve them.

Trusting that we may have the opportunity of serving you and assuring you of our best possible cooperation, we remain

Very truly yours, Aircraft & Diesel Equipment Corporation; L. G. Simmons, Sales Manager.

LGS:M

[fol. 430] EXHIBIT B-8-A

Buick Motor Division, General Motors Corporation
Melrose Park, Ill.

March 16, 1942

Aircraft & Diesel Equipment Corp., 4401 N. Ravenswood Ave., Chicago, Ill.
Attention: Mr. L. G. Simmons.
Gentlemen:

We have accepted the assignment from the Air Corp to increase our engine schedule to 3,000 engines per month by June 1943.

We are attaching hereto a form on which we have shown in pieces required, our projected schedule through June 1943, when this figure is reached and from this point on, as we see it today, it should remain constant. We have also shown opposite each part number the percentage of spares for that particular part, which percentage is against the quantity shown for each month as the spares must be shipped to us this way inasmuch as we are obliged to furnish them concurrently with the engines as we ship them.

All figures on this schedule are net and by that we mean that no allowance has been made for rejected material, vendor responsible and no allowance has been made for scrap loss in our own plant. These are items which we are unable to give any estimate on today, but are quantities which will have to be added to the requirements shown, as and when they develop.

You will please study this enclosed schedule and advise us just as quickly as possible your ability to meet the same.

Very truly yours, Buick Motor Division, General Motors Corporation; B. Wm. Stickney, Ass't. Dir. of Purchases.

BWS:mw
encl.

(Here follows photolithograph side folio 431)

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 N. Ravenswood Ave.
Chicago, Ill.

PROJECTED SCHEDULE OF REQUIREMENTS IN PIECES
Add to Each Month Requirement Percentage for Spares as Shown in Last Column

Part #	Name	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	1943 Jan.	Feb.	Mar.	Apr.	May	June	Plus % Spares
1177	Insert	1200	1600	1800	2000	2200	2600	3000	3400	3800	4000	4000	4400	4800	5200	5600	6000	14%
0140	Pipe	1200	1600	1800	2000	2200	2600	3000	3400	3800	4000	4000	4400	4800	5200	5600	6000	12%
20297	Pin	3600	4800	5400	6000	6600	7800	9000	10200	11400	12000	12000	13200	14400	15600	16800	18000	1%
23145	Spacer	4200	5600	6300	7000	7700	9100	10500	11900	13300	14000	14000	15400	16800	18200	19600	21000	9%
23365	Pipe	2400	3200	3600	4000	4400	5200	6000	6800	7600	8000	8000	8800	9600	10400	11200	12000	12%
24160	Plate	600	800	900	1000	1100	1300	1500	1700	1900	2000	2000	2200	2400	2600	2800	3000	18%
24164	Shaft	600	800	900	1000	1100	1300	1500	1700	1900	2000	2000	2200	2400	2600	2800	3000	20%
25856	Shaft	600	800	900	1000	1100	1300	1500	1700	1900	2000	2000	2200	2400	2600	2800	3000	39%
26689	Spacer	6000	8000	9000	10000	11000	13000	15000	17000	19000	20000	20000	22000	24000	26000	28000	30000	5%
34224	Pin	600	800	900	1000	1100	1300	1500	1700	1900	2000	2000	2200	2400	2600	2800	3000	28%
37035	Valve	600	800	900	1000	1100	1300	1500	1700	1900	2000	2000	2200	2400	2600	2800	3000	27%
39028	Dowel	1200	1600	1800	2000	2200	2600	3000	3400	3800	4000	4000	4400	4800	5200	5600	6000	10%
39899	Dowel	1200	1600	1800	2000	2200	2600	3000	3400	3800	4000	4000	4400	4800	5200	5600	6000	10%
47793	Plug	600	800	900	1000	1100	1300	1500	1700	1900	2000	2000	2200	2400	2600	2800	3000	12%

[fol. 432] EXHIBIT B-9

AK119 BUK2 TWS Paid 3 Mins—Melrose Park Ill 244P Mar 20 1942—C B Kelleher Aircraft & Diesel Equipment Corp—4401 N Ravenswood Ave Chicago Ill—

We have been instructed by the Army Air Corp to proceed at once in placing orders with our machinery tool builders prior to April first to take care of our increased engine building program from 2,000 to 3,000 engines per month. You have already received a letter from us under recent date giving you our monthly requirements. If you require additional equipment to take care of this production, it is necessary in order for you to obtain mac-inery, that your orders also be placed prior to April First.

L. A. Stewart, Buick Motor Division.

[fol. 433] EXHIBIT B-10

March 21, 1942

Buick Motor Division, General Motors Corporation, Aviation Engine Plant, Melrose Park, Illinois.
Attention: Mr. B. Wm. Stickney.

Gentlemen:

On March 20, 1942, we received a telegram from your Mr. L. A. Stewart about machinery needed to step up production on your parts to take care of 3,000 engines per month.

In order to supply you with the parts, in the quantities necessary to meet your schedule of 3,000 engines per month our machine capacity should be increased by the following machines:

Two (2) #2 Brown & Sharpe High Speed Automatics with standard equipment at an estimated cost of	$4,400.00 ea.
One (1) #1 Brown & Sharpe Universal Grinding Machine complete but less No. 03M Internal Grinding fixture at an estimated cost of	$3,515.00
One (1) Van Norman Handmill Reversing Mechanism, Coolant tank and motor at an estimated cost of	$1,827.00

We are not in a position to purchase this machinery ourselves. However you (like some of our other customers who have increased their schedules with us) may wish to purchase this machinery and loan it to us for your work.

Very truly yours, Aircraft & Diesel Equipment Corporation, B. Ch. Kelleher, President.

BCK:rf

[fol. 434] EXHIBIT B-11

Buick Motor Division, General Motors Sales Corporation
Aviation Engine Plant, Melrose Park, Ill.

April 14, 1942

Aircraft & Diesel Equipment Corporation, 4401 No. Ravenswood Avenue, Chicago, Illinois.
Attention: Mr. B. C. Kelleher.

Gentlemen:

This will acknowledge receipt of your letter of March 21st. with reference to the projected schedule which we sent you on March 20th. and is to advise you that the necessary machinery has been set in motion to provide the four machines referred to in that letter.

We are assuming that this is all you need to take care of the increased schedule as outlined to you.

Will you kindly advise regarding.

Very truly yours, Buick Motor Division, General Motors Corporation; B. Wm. Stickney, Ass't. Dir. of Purchases.

BWS:mw

[fol. 435] EXHIBIT B-12

April 16, 1942.

Buick Motor Division, General Motors Corporation, Aviation Engine Plant, Melrose Park, Illinois.
Attn: Mr. B. W. Stickney, Ass't. Dir. of Purchases.

Gentlemen:

In answer to your letter of April 14th, we wish to advise you that we feel that we can take care of the produc

tion of your parts for your increased schedule with the additional machinery listed in our letter of March 21st.

Very truly yours, Aircraft & Diesel Equipment Corporation; B. Ch. Kelleher, President.

BChK:R

[fol. 436] EXHIBIT B-13

Buick Motor Division, General Motors Corporation
Melrose Park, Ill.

July 7, 1942

Aircraft & Diesel Equipment Co., 4401 North Ravenswood Avenue, Chicago, Illinois.

Attention:

Gentlemen:

We have had a revision from the A. A. F. in our engine schedule and also in the quantities of spares which it is necessary for us to furnish.

We have worked out this requirement, which has been projected over the balance of this year and through 1943, showing you our requirements by months and the accumulative total.

We would like to have you review this revised requirement as quickly as possible and advise us as to your ability to take care of our requirements as outlined on the attached projection.

Your early attention and a prompt reply giving us this information is requested and will be appreciated.

Very truly yours, Buick Motor Division, General Motors Corporation; B. Wm. Stickney, Ass't. Dir. of Purchases.

BWS:mw
encl.

[fol. 437]

EXHIBIT B-13-A

Aircraft & Diesel Equipment Corp.

July 11, 1942

Page 1

Part No.		Thru June	July	Aug.	Sept.	Oct.	Nov.	Dec.
1177	Total	6278	1800	2112	2400	2700	2940	3420
	Accum. Total	6278	8078	10190	12590	15290	18230	21650
20140	Total	6802	1950	2288	2600	2925	3185	3705
	Accum. Total	6802	8752	11040	13640	16565	19750	23455
20297	Total	18835	5400	6336	7200	8100	8820	10260
	Accum. Total	18835	24235	30571	37771	45871	54691	64951
2—45	Total	58946	16900	19829	22533	25350	27603	32110
	Accum. Total	58946	75846	95675	118208	143558	171161	203271
23365	Total	13603	3900	4576	5200	5850	6370	7410
	Accum. Total	13603	17503	22076	27279	33129	39499	46909

[fol. 438]

Aircraft & Diesel Equipment Corp.

July 11, 1942

Page 1-A

Part No.		1943 Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
1177	Total	4209	4709	5358	5954	6684	7355	7381	7406	7432	7452	7494	7476
	Accum. Total	25859	30568	35926	41880	48564	55919	63300	70706	78138	85590	93084	100560
20140	Total	4406	5138	5862	6507	7302	7933	8073	8110	8459	8839	9281	9800
	Accum. Total	27861	32999	38861	45368	52670	60603	68676	76786	85245	94084	103365	113165
20297	Total	12162	14127	16075	17864	20054	22065	22146	22220	22298	22360	22484	22639
	Accum. Total	77113	91240	107315	125179	145233	167298	189444	211664	233962	256322	278806	301445
23145	Total	37875	43719	49542	55162	61961	68198	68301	68397	68497	68577	68736	68936
	Accum. Total	241146	284865	334407	389569	451530	519728	588029	656426	724923	793500	862236	931172
23365	Total	8812	10277	11724	13014	14604	16065	16612	17232	17930	18690	19574	20613
	Accum. Total	55721	65998	77722	90736	105340	121405	138017	155249	173179	191869	211443	232053

[fol. 439]

Aircraft & Diesel Equipment Corporation

July 13, 1942

Page 2

Part No.		Thru June	July	Aug.	Sept.	Oct.	Nov.	Dec.
24160	Total	3139	900	1056	1200	1350	1470	1710
	Accum. Total	3139	4039	5095	6295	7645	9115	10825
24164	Total	3139	900	1056	1200	1350	1470	1710
	Accum. Total	3139	4039	5095	6295	7645	9115	10825
25856	Total	3924	1125	1320	1500	1688	1838	2138
	Accum. Total	3924	5049	6369	7869	9557	11395	13533
26689	Total	39240	11250	13200	15000	16875	18375	21375
	Accum. Total	39240	50490	63690	78690	95565	113940	135315
34224	Total	3924	1125	1320	1500	1688	1838	2138
	Accum. Total	3924	5049	6369	7869	9557	11395	13533

[fol. 440]

Aircraft & Diesel Equipment Corporation

July 13, 1942

Page 2A

Part No.		1943 Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
24160	Total	2027	2354	2679	2977	3342	3677	3691	3703	3716	3726	3747	3773
	Accum. Total	12852	15206	17885	20862	24204	27881	31572	35275	38991	42717	46464	50237
24164	Total	2027	2354	2679	2977	3342	3677	3691	3703	3716	3726	3747	3773
	Accum. Total	12852	15206	17885	20862	24204	27881	31572	35275	38991	42717	46464	50237
25856	Total	2556	2999	3436	3807	4269	4694	4728	4759	4791	4817	4869	4934
	Accum. Total	16089	19088	22524	26331	30600	35294	40022	44781	49572	54389	59258	64192
26689	Total	25552	29989	34355	38061	42688	46943	47279	47590	47914	48173	48691	49338
	Accum. Total	160867	190856	225211	263272	305960	352903	400182	447772	495686	543859	592550	641888
34224	Total	2556	2999	3436	3807	4269	4694	4728	4759	4791	4817	4869	4934
	Accum. Total	16089	19088	22524	26339	30600	35294	40022	44781	49572	54389	59258	64192

[fol. 441]

Aircraft & Diesel Corp.

July 11, 1942

Page 3

Part No.		Thru June	July	Aug.	Sept.	Oct.	Nov.	Dec.
37035	Total	3270	938	1100	1250	1406	1531	1781
	Accum. Total	3270	4208	5308	6558	7964	9495	11276
—028	Total	6069	1740	2032	2320	2610	2842	3306
	Accum. Total	6069	7809	9841	12161	14771	17613	20919
39899	Total	6069	1740	2032	2320	2610	2842	3306
	Accum. Total	6069	7809	9841	12161	14771	17613	20919
—93	Total	3322	953	1118	1270	1429	1551	1810
	Accum. Total	3322	4275	5393	6663	8092	9643	11453

[fol. 442]

Aircraft & Diesel Equipment Corporation

July 13, 1942

Page 3A

Part No.		Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
37035	Total	2115	2462	2805	3115	3496	3847	3864	3879	3895	3908	3934	3966
	Accum. Total	13391	15853	18658	21773	25269	29116	32980	36859	40754	44662	48596	52562
39028	Total	3914	4538	5157	5734	6438	7085	7106	7126	7147	7163	7197	7238
	Accum. Total	24833	29371	34528	40262	46700	53785	60891	68017	75164	82327	89524	96762
39899	Total	3914	4538	5157	5734	6438	7085	7106	7126	7147	7163	7197	7238
	Accum. Total	24633	29371	34528	40262	46700	53785	60891	68017	75164	82327	89524	96762
47793	Total	2150	2505	2856	3171	3559	3915	3933	3950	3968	3982	4010	4045
	Accum. Total	13610	16108	18964	22135	25694	29609	33542	37492	41460	46442	49452	53497

[fol. 443] EXHIBIT B-14

July 14, 1942.

Buick Motor Division, General Motors Corporation, Melrose Park, Ill.

Attn: Mr. B. W. Stickney, Ass't. Director of Purchases.

Gentlemen:

We have reviewed your schedule of your requirements of the parts which we are making for you, and believe that we can keep up with your required deliveries provided we receive the delivery of your machinery within the next three months.

Very truly yours, Aircraft & Diesel Equipment Corporation; L. G. Simmons, Sales Manager.

LGS:R

[fol. 444] EXHIBIT B-15

Buick Motor Division, General Motors Corporation
Flint, Michigan

December 19, 1942

Aircraft & Diesel Equipment Corp., 4401 Ravenswood Avenue, Chicago, Illinois.

Gentlemen:

This is to advise you that the Government prime contracts listed below, on which General Motors Corporation (Buick Motor Division) is prime contractor or a major subcontractor, are all subject to renegotiation, as set forth in the Sixth Supplemental National Defense Appropriation Act, approved April 28, 1942. Accordingly, said contracts contain an article directing General Motors Corporation (Buick Motor Division) as contractor to include a renegotiation provision as a part of all subcontracts and purchase orders issued thereunder:

Column I Contract No.	Column II Applicable Renegotiation Clause	Column III Purchase Orders Subject to Renegotiation
W-374-Ord-1889	Exhibit A—Buick 1615A	April 28, 1942
W-535-AC-24931	Exhibit A—Buick 1615A	July 28, 1942
W-535-AC-29294	Exhibit A—Buick 1615A	May 21, 1942
W-374-Ord-1464 (Supply)	Exhibit A—Buick 1615A	April 28, 1942
W-374-Ord-1464 (Facilities)	Exhibit A—Buick 1615B	April 28, 1942
W-374-Ord-1309 (Supply)	Exhibit A—Buick 1615A	April 28, 1942
W-374-Ord-1309 (Facilities)	Exhibit A—Buick 1615B	April 28, 1942
W-535-AC-30132	Exhibit A—Buick 1615	April 28, 1942
W-535-AC-29020	Exhibit A—Buick 1615	April 28, 1942
W-374-Ord-1668	Exhibit A—Buick 1615	April 28, 1942
W-535-AC-17479	Exhibit A—Buick 1615A	October 12, 1942
W-535-AC-24592	Exhibit A—Buick 1615A	October 12, 1942

In order that Buick Motor Division may comply with the provisions of each of the above Government contracts (Column 1), it is necessary that we request you to agree that the renegotiation provisions applicable to each of [fol. 445] the above Government contracts, as shown in Column II of the above chart, and which renegotiation provisions are attached hereto and identified as Exhibit "A—Buick 1615", Exhibit "A—Buick 1615A, and Exhibit "A—Buick 1615B, as the case may be, are applicable to and a part of each purchase order issued to you by Buick Motor Division of General Motors Corporation on and after the date shown in Column III of the above chart, when said purchase order, either alone, or in combination with other purchase orders for material to be used on the same Government contract, equals or exceeds an amount of $100,000.00.

In the attached Exhibits "A" (Buick 1615, 1615A, and 1615B, respectively) the term "Seller" means Aircraft & Diesel Equipment Corp. and the term "Buyer" means General Motors Corporation (Buick Motor Division).

If you will refer to purchase orders issued by General Motors Corporation (Buick Motor Division) you will note the Government contract number typed on the face of the purchase order.

Beginning December 21, 1942, Buick Motor Division will attach the appropriate renegotiation clause to each purchase order issued on and after that date, with the request that the Supplier agree that such renegotiation clause shall be applicable to that particular purchase order if it exceeds $100,000.00, or to that particular purchase order when it, along with previous or subsequent purchase orders issued for material to be used on the same Government contract, equals or exceeds $100,000.00.

In order that Buick Motor Division may secure your acceptance of the above understanding and agreement, it is requested that you sign the carbon copy of this letter attached hereto in the space provided thereon for acceptance, and return same to the undersigned for our files.

Very truly yours, General Motors Corporation (Buick Motor Division), By (Name illegible), Ass't Director of Purchases.

WJB:B

Accepted: Aircraft & Diesel Equipment Corp., By ——, Duly Authorized Officer; T. J. Murphy, Comptroller.

[fol. 446] Buick 1615

EXHIBIT A

Renegotiation Pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942.

1. At such period or periods when in the judgment of the Secretary the profits accruing to Seller under this contract can be determined with reasonable certainty, the Secretary and Seller upon the written demand of the Secretary will renegotiate the contract price with a view of eliminating such profits which are found, as a result of such renegotiation, to be excessive.

2. In the event that such a renegotiation results in a reduction of contract price, the amount of such reduction shall, as directed by the Secretary,

(a) Be deducted by Buyer from payments to Seller under this Contract; or

(b) Be paid by Seller directly to the Government; or

(c) Be repaid by Seller to Buyer.

3. Seller agrees that Buyer shall not be liable to Seller for or on account of any amount repaid to Buyer or paid to the Government by Seller or deducted by Buyer from payments under this contract, pursuant to directions from the Secretary in accordance with provisions of this article. Under its contract with the Government, Buyer is obligated to pay or credit to the Government all amounts repaid by or withheld from Seller hereunder.

4. The term "Secretary" as used in this article means Secretary of War or any duly authorized representative of the Secretary, including the Contracting Officer.

Buick 1615-A

[fol. 447] EXHIBIT A

"ARTICLE — Renegotiation Pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942.

"(1) Upon the written demand of the Secretary, at such period or periods when, in the judgment of the Secretary, the profits accruing to Seller, under this contract can be determined with reasonable certainty, the Secretary and Seller, will renegotiate the contract price to eliminate therefrom any amount found as a result of such renegotiation

to represent excessive profits. The demand of such renegotiation to represent excessive profits. The demand of the Secretary shall fix a place for renegotiation and a time for the commencement thereof not later than one year after the date of completion or termination of this contract as found by the Secretary.

"(2) Seller will furnish to the Secretary such statements of actual costs of production and such other financial statements, at such times and in such form and detail, as the Secretary may prescribe, and will permit such audits and inspections of its books and records as the Secretary may request.

"(3) Any amount of the contract price found as a result of such renegotiation to represent excessive profits shall, as directed by the Secretary,

"(a) Be deducted by Buyer from payments otherwise due to Seller under this contract; or

"(b) Be paid by Seller directly to the Government.

"(4) Seller agrees that Buyer shall not be liable to Seller for or on account of any amount paid to the Government by Seller or deducted by Buyer from payments otherwise due under this contract, pursuant to directions from the Secretary in accordance with the provisions of this Article. Under its contract with the Government, Buyer is obligated to pay or credit to the Government all amounts withheld by it from Seller hereunder.

"(5) As used in this article:

"(a) The term 'Secretary' means the Secretary of War or any duly authorized representative of the Secretary, including the contracting officer;

"(b) The terms 'Renegotiate' and 'renegotiation' have the same meaning as in Section 403 (b) of the Sixth Supplemental National Defense Appropriation Act, 1942;

"(c) The term 'this contract' means this contract as modified from time to time.

[fol. 448] Buick 1615-B

EXHIBIT A

"ARTICLE —Renegotiation Pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942.

"(1) Upon the written demand of the Secretary, at such period or periods when, in the judgment of the Secretary, the profits accruing to Seller, under this contract can be determined with reasonable certainty, the Secretary and Seller, will renegotiate the contract price to eliminate therefrom any amount found as a result of such renegotiation to represent excessive profits. The demand of the Secretary shall fix a place for renegotiation and a time for the commencement thereof not later than one year after the date of completion or termination of this contract as found by the Secretary.

"(2) Seller will furnish to the Secretary such statements of actual costs of production and such other financial statements, at such times and in such form and detail, as the Secretary may prescribe, and will permit such audits and inspections of its books and records as the Secretary may request.

"(3) Any amount of the contract price found as a result of such renegotiation to represent excessive profits shall, as directed by the Secretary,

"(a) Be deducted by Buyer from payments otherwise due to Seller under this contract; or

"(b) Be paid by Seller directly to the Government.

"(4) Seller agrees that Buyer shall not be liable to Seller for or on account of any amount paid to the Government by Seller or deducted by Buyer from payments otherwise due under this contract, pursuant to directions from the Secretary in accordance with the provisions of this Article. Under its contract with the Government, Buyer is obligated to pay or credit to the Government all amounts withheld by it from Seller hereunder.

"(5) As used in this Article:

"(a) The term 'Secretary' means the Secretary of War or any duly authorized representative of the Secretary including the contracting officer;

"(b) The terms 'Renegotiate' and 'Renegotiation' have the same meaning as in Section 403 (b) of the Sixth Supplemental National Defense Appropriation Act, 1942;

"(c) The term 'this contract' means this contract as modified from time to time.

"(6) Seller agrees (a) to include in each fixed-price or lump-sum sub-contract hereunder for an amount in excess of $100,000 the foregoing sections (1) to (5) inclusive, and

(b) to make no subdivisions of any contract or sub-contract for the purpose of evading the provisions of this section, and (c) to repay to the government the amount of any reduction in the contract price of any such contract which results from renegotiation thereof by the Secretary and which the Secretary directs Seller to withhold from payments otherwise due under such contract and actually unpaid at the time Seller receives such direction."

ALLMART & DIESEL EQUIPMENT CORP.
4601 Rutherwood Avenue
CHICAGO, ILL.

BUDA MOTORS DIVISION

4 of 17

SHIPMENTS

PART NO	NUMBER FIRST ORDER	DESCRIPTION	Nov. 30 1941	Dec. 1 to 9-11-42	To 11-30-42	Nov. 30, 1942	Nov. 30, 1943	May 31, 1945	TOTAL	Shipments on orders received prior to 9-11-42	Shipments on orders received after 9-11-42
23365	P-764	Pin Crank Pin	46[illegible]55		1139[illegible]	37[illegible]49	38589[illegible]5	18[illegible]08	11[illegible]49	20[illegible]81	29[illegible]11
20140	P-766	Pin & Shaft Oil	[illegible]766 43		[illegible]7705	388[illegible]17	4093[illegible]85	1593[illegible]1	1[illegible]560 91	[illegible]400 24	1016068
1177	P-765	Insert	9[illegible]86	183900	5940[illegible]68	1738930	3[illegible]3[illegible]76	4[illegible]93[illegible]4	6[illegible]6[illegible]6 93	1[illegible]67[illegible]6	50[illegible]4[illegible]8
[illegible]6689	P 769	Spacer	439163		87[illegible]5[illegible]1	[illegible]76[illegible]677	38070[illegible]85	9[illegible]47[illegible]6	8[illegible]76[illegible]17	1[illegible]33[illegible]76	70[illegible]636
[illegible]3145	P-770	Spacer	3[illegible]96[illegible]71		[illegible]28[illegible]5[illegible]97	68[illegible]00 69	[illegible]49[illegible]29	1[illegible]65[illegible]87	156[illegible]7103	1[illegible]19[illegible]2	1[illegible]40[illegible]75[illegible]0
20297	P-771	Pin Clutch Springs Sub.	[illegible]7[illegible]38		[illegible]41133	2[illegible]85[illegible]3	16[illegible]6[illegible]89	2[illegible]90[illegible]7	5[illegible]15[illegible]75	1[illegible]19098	3996177
35850	P 772	Shaft Oil Pump Idler	[illegible]097 97		[illegible]4[illegible]74	15[illegible]470	17896[illegible]51	7[illegible]7[illegible]7	[illegible]4[illegible]596[illegible]4	10[illegible]8[illegible]18	37[illegible]0[illegible]4
[illegible]4164	P 773	Shaft Sub Fuel Drain	[illegible]1[illegible]70		3[illegible]90160	10363[illegible]9	8[illegible]8[illegible]85	1[illegible]56[illegible]00	[illegible]59[illegible]26	[illegible]6[illegible]08	10[illegible]3[illegible]16
[illegible]2160	P 777	Plate Sub Fuel Drive Valve	39[illegible]41		[illegible]793[illegible]	[illegible]385[illegible]8	[illegible]21393		[illegible]7[illegible]85 73	1[illegible]46[illegible]	133071
39078	P 861	Dowel	8[illegible]500		21[illegible]5[illegible]	[illegible]4[illegible]7[illegible]87	[illegible]57[illegible]57	1[illegible]283[illegible]	1[illegible]8[illegible]5[illegible]61	3683[illegible]7	1057[illegible]3[illegible]
47793	P 779	Plug	[illegible]8[illegible]91	1[illegible]78[illegible]	15[illegible]6[illegible]	[illegible]6[illegible]73	[illegible]180[illegible]	51[illegible]00	8[illegible]0[illegible]70	3078[illegible]0	53[illegible]560
39899	P 780	Dowel Gun Drive	100[illegible]17		1[illegible]5[illegible]88	[illegible]368[illegible]87	4[illegible]00[illegible]50	[illegible]7[illegible]1[illegible]7	1[illegible]5[illegible]967[illegible]08	[illegible]3[illegible]7[illegible]6[illegible]5	116[illegible]0[illegible]3
37035	P 781	Valve Combustion Relief	[illegible]5[illegible]96	[illegible]4[illegible]9	[illegible]58[illegible]978	2[illegible]83[illegible]3	[illegible]60[illegible]9[illegible]5[illegible]		5[illegible]5[illegible]596[illegible]3	1[illegible]36[illegible]	37[illegible]4[illegible]1
3[illegible]4[illegible]	P 783	Pin Crank Shaft	[illegible]49985		168[illegible]05	[illegible]5[illegible]79[illegible]	[illegible]893[illegible]3	[illegible]71[illegible]4[illegible]	15[illegible]57[illegible]	3[illegible]13[illegible]00	119[illegible]9[illegible]5
[illegible]6[illegible]49	P 784	Bush Cam Starter Fa[illegible]	[illegible]6[illegible]38[illegible]						[illegible]6[illegible]3[illegible]59	[illegible]6[illegible]3[illegible]59	
79414		Pin Set Screw Locking				[illegible]58[illegible]76	21[illegible]5[illegible]29	[illegible]16[illegible]5[illegible]90	[illegible]4[illegible]9[illegible]19[illegible]		[illegible]4[illegible]7[illegible]19[illegible]
			$ 31[illegible]68 35	41[illegible]45	$ 5[illegible]9[illegible]4[illegible]09	[illegible]56[illegible]09[illegible]6	[illegible]6[illegible]5[illegible]87	60[illegible]1[illegible]538	7[illegible]17[illegible]59[illegible]5[illegible]6	1[illegible]33[illegible]0885	57[illegible]78[illegible]1

ORDERS RECEIVED PRIOR TO 9-11-42 SHIPMENTS

PART NO	1941	1942	1943	TOTAL
23365	[illegible]	1139[illegible]	[illegible]	[illegible]
20140	[illegible]	1143760	196[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]6689	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]3145	[illegible]	[illegible]	[illegible]	[illegible]
20297	[illegible]	[illegible]	[illegible]	[illegible]
35850	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]4164	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]2160	[illegible]	[illegible]	[illegible]	[illegible]
39078	[illegible]	[illegible]	[illegible]	[illegible]
47793	[illegible]	[illegible]	[illegible]	[illegible]
39899	100[illegible]17	[illegible]	[illegible]	[illegible]
37035	[illegible]	[illegible]	[illegible]	[illegible]
3[illegible]4[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]6[illegible]49	[illegible]	[illegible]	[illegible]	[illegible]
	$ 31[illegible]68 32	[illegible]	[illegible]	[illegible]

ORDERS AFTER 9/11/42 [illegible]

Exhib

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer BUICK — Part Number 23265 — PIPE CRANK PIN.

Purchase Order No.	Order Date	Quantity	Date of 1st Delv.	1941	Shipments 12-7-41 to 1-28-42	1942	1943	1944	1945	Overrun	Cancelled Orders	Balance
P-76V	3-12-41	V 000	9-9-41	462.55								
P V788	1-15-42	23436	6-6-42			Rel 6V						
P 3659	3-18-42	25000	9-15-42			5701 47	37313					
P 5355	4-16-42	16788	12-5-42				29.331					
P 6731	7-15-42	7400	4-27-43				5845 21					
P 9418	6-9-42	4300	3-30-43				5589.90					
P 12518	8-7-42	45600	3-31-43				11080.77					
P 14975	11-13-42	8000	7-14-43				1901.7					
P 15815	1-7-43	65000	8-5-43				13781.62	2946				
P 7477	2-23-43	30000	12-9-43					11160.00				
P V685	6-17-43	29800	2-10-44					4778.00			16000	
P 29109	9-17-43	30000	3-23-44					7007.00			3000	
P 13791	10-11-43	18100	Cancelled								18100	
P 3V870	10-28-43	1497	11-8-43				2876.61					
P 37673	11-28-43	18000	5-19-44					5580.00				
P 39968	3-11-44	1370	6-30-44					4247.00				
41079	4-24-44	25000	5-29-44					7750.00				
41871	4-12-44	20000	7-24-44					6200.00	2480.44			
42823	4-10-44	1000	5-24-44					2976.00				
43147	4-26-44	10000	5-27-44					3100.00				
43668	10-2-44	378	10-20-44					1171.80			378.00	
44078	11-10-44	10000	12-27-44					3100.00				
44269	11-27-44	10000	12-27-44					3100.00				
44270	11-27-44	10000	12-27-44					3100.00				
44271	11-27-44	10000	12-27-44					3100.00				
44272	11-27-44	10000	12-27-44					3100.00				
44907	1-11-45	10000	2-28-45						3100.00			
45069	1-24-45	7000										
45171	2-1-45	10000										
45467	2-22-45	10000										
45849	3-8-45	20000									7000	
46287	3-30-45	10000									10000	
46370	4-2-45	10000									10000	
46823	4-11-45	211	4-24-45						65.41			
47627	5-15-45	10000										
CREDITS												

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Page Number 1 of 17

Part No. 20140

Piper Cub Shatt Oil

Purchase Orders No.	Date	Quantity	Date of Last Order	1943	1944	1945	1946	1947	Rejects	Overrun	Cancelled	Balance
P 7644	3-[illegible]-41	10000	8-[illegible]-41	16643						944		
P 4116	3-7-41	1[illegible]00	8-31-41			8400						
P 5191	4-16-41	900	8-8-41			597.66	196.19			[illegible]64		
P 9416	6-9-41	1[illegible]00	1-[illegible]-43				8400					
P 10176	7-13-41	400	1-[illegible]-43				[illegible]800					
P 12516	8-7-41	[illegible]800	1-[illegible]-43				1405.04		[illegible]68			
P 15819	1-7-43	3[illegible]000	6-26-43				[illegible]0683	1437				
P 16660	1-[illegible]-43	[illegible]288	4-[illegible]-43				1800					
P 17480	[illegible]-3-41	19[illegible]00	1[illegible]-[illegible]-43					Replaced defective material				
P [illegible]683	6-17-43	900	3-31-44								600	
P [illegible]867	9-17-43	1250	3-31-44								4[illegible]0	
P 3[illegible]89	[illegible]-[illegible]-43	880	Cancelled								400	
P 3767	[illegible]-28-41	400	4-30-44									
P [illegible]91	1-[illegible]-44	11[illegible]9	5-16-44			789.29						
[illegible]0176	[illegible]-[illegible]-44	6[illegible]00	[illegible]-[illegible]-44									
[illegible]1819	[illegible]-[illegible]-44	[illegible]000	8-16-44					1637	650		500	
[illegible]4597	[illegible]-[illegible]-44	[illegible]01	[illegible]-30-44					4217				
[illegible]0536	[illegible]-31-44	[illegible]000									[illegible]000	
[illegible]1418	[illegible]-28-44	[illegible]400									[illegible]400	
[illegible]6198	11-10-44	[illegible]000	[illegible]-1-45									
[illegible]6199	11-10-44	[illegible]400	[illegible]-31-45									
[illegible]4445	[illegible]-11-44	[illegible]400	1-[illegible]-45									
[illegible]9069	[illegible]-[illegible]-44	[illegible]000	[illegible]-[illegible]-45									
[illegible]4509	[illegible]-[illegible]-44	400	[illegible]-[illegible]-45									
[illegible]4629	[illegible]-[illegible]-44	[illegible]000	[illegible]-[illegible]-45									
[illegible]0479	[illegible]-[illegible]-44	[illegible]000	[illegible]-[illegible]-45									
[illegible]4879	[illegible]-[illegible]-44	[illegible]000	[illegible]-[illegible]-45									
[illegible]5329	[illegible]-[illegible]-44	[illegible]000										
[illegible]5329	[illegible]-[illegible]-44	[illegible]000										
[illegible]6479	[illegible]-[illegible]-44	1[illegible]67	[illegible]-[illegible]-45									
[illegible]7450	[illegible]-[illegible]-45	[illegible]000										
[illegible]8183	[illegible]-[illegible]-45	[illegible]4[illegible]	[illegible]-[illegible]-45									
[illegible]9461	[illegible]-[illegible]-45	[illegible]000										
				[illegible]6[illegible]96	[illegible]0[illegible]4[illegible]	[illegible]6[illegible]3[illegible]	[illegible]5[illegible]3[illegible]	[illegible]4[illegible]3[illegible]	[illegible]4[illegible]3[illegible]			
Credits						[illegible]907						
						[illegible]9[illegible]0[illegible]						

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer Buick — Part No. 1177

INSERT

Purchase Release No.	Date	Quantity	Date of 1st delivery	1941	1942	1943	1944	1945	Overrun Cancellations
[illegible] 765	9-12-41	60000	10-22-41	97786	183900				1079
[illegible] 2542	1-15-42	12000	7-17-42			40800			
[illegible] 3605	3-17-42	12750	9-28-42			180948	233052		75
[illegible] 4980	4-15-42	9000	2-10-43				81770		5
[illegible] 6518	7-15-42	16900	4-2-43				50[illegible]		2142
16918	1-8-43	18600	9-11-43				63[illegible]		
17963	2-22-43	14150	11-20-43				24760	[illegible]8378	
19714	6-12-43	14650	1-22-44					[illegible]6779	766
21790	9-17-43	14750	4-7-44					708000	
23065	10-11-43	7150	6-2-44					[illegible]8592	1796
23554	11-28-43	161	12-9-44					[illegible]4746	
24369	4-5-44	12	4-24-44					[illegible]76	
24509	4-24-44	4	5-9-44					76	
25129	5-17-44	18	5-26-44					479	
25992	6-28-44	6217	8-4-44					[illegible]07976	
24137	3-24-44	7100	8-26-44					[illegible]50748	87072
41867	5-4-44	13800	6-8-44					[illegible]64[illegible]79	
45080	6-16-44	4900	12-12-44						4900
46[illegible]1	[illegible]-24-44	5000	[illegible]					50[illegible]4	5000
46[illegible]3	[illegible]-10-44	5000	[illegible]-27-44					50[illegible]2	
46[illegible]4	[illegible]-10-44	444	[illegible]-11-44				[illegible]5811		
46[illegible]5	[illegible]-11-44	5000	[illegible]-2-45					50[illegible]4	
46[illegible]8	[illegible]-11-44	5000	[illegible]-2-45					76[illegible]6	
46[illegible]9	[illegible]-8-45	5000	[illegible]-8-45					96[illegible]5	
46[illegible]9	[illegible]-7-45	5000	[illegible]-6-45					50[illegible]7	
46[illegible]9	[illegible]-8-45	5000	[illegible]-8-45					50[illegible]7	1000
46[illegible]9	[illegible]-6-45	5000	[illegible]-6-45					50[illegible]6	
47[illegible]9	[illegible]-13-45	64							
47386	[illegible]-7-45	5000							
				97786	183900	180948	233052	981[illegible]6	10[illegible]5

CROSS ITEMS

[illegible]

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Roosevelt Avenue
CHICAGO, ILL.

Customer (Buick

Part No. 26689

SPACER

Purchase Order No.	Date	Quantity	Date of 1st Delivery	2951	2915	2966	1945	Overrun	Cancellations
P-769	9-17-41	50000	7-11-41	49163				837	
P-26894	1-14-42	75446	6-24-42		47503			446	
P-4016	3-17-42	44700	7-2-42		44748			1052	
P-4809	4-18-42	45000	12-31-42			35000			
P-6677	7-15-42	185000	1-14-43			125000			
16799	1-9-43	85000	8-21-43			104175	17444		18500
17894	2-22-43	69000	12-20-43				69000		
18590	4-3-43	20100	1-19-44				20100	719	
19210	6-8-43	4000	1-18-44				4000		
19511	6-18-43	18000	1-18-44				18000		
20107	8-28-43	15000	2-8-44				24200		
21637	10-1-43	40000	—						40000
22049	10-11-43	21000	—						21000
20535	8-17-43	1107418	2-4-44			1077418	67676		61600
23274	11-15-43	4000	2-21-44				4000		
24173	12-6-43	44200	3-21-44				24200		
20044	12-18-43	15000	—				—		
20715	1-15-44	20000	—				—		
21685	10-29-43	20000	—				—		
22496	2-22-44	4000	—				—		
20555	3-10-44	45000	—				—		25000
20879	3-15-44	39100	—				—		39100
24599	4-10-44	26000	—				—		26000
				49163	795113	1304477	3804838	918476	

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer BUICK — Part Number 23125

SPACER

No.	Date	Quantity	Date Req.	1943	1944	1945	Over Run	Cancelled
P 770	3-17-41	25000	9-5-41	3796 71				
P 3682	1-15-42	38677	7-8-42		4-9976			
P 3654	3-17-42	23114	7-11-42		4579 80			
P 5353	4-18-42	30100	4-18-42		3969 36		Yellow	
P 6138	6-13-42	241290	10-17-42		1246796	1116796		17572
P 6249	7-17-42	188000	Cancelled					
P 15121	10-8-42	140558	Cancelled					
P 16726	1-26-43	86000	7-17-43			5168+94	511694	
P 17619	2-11-43	279158	3-26-43			58[illegible]	[illegible]	
P 19430	6-11-43	61450	7-11-43					
21537	9-7-43	119900	7-16-44			[illegible]		
23719	11-4-43	18651	3-14-44			[illegible]		
24524	10-11-43	125000	6-29-44			[illegible]		
24806	11-19-43	242413	7-21-44			[illegible]		17771
24826	12-12-43	110200	11-7-44			[illegible]		
25028	12-22-43	202011	8-21

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer Buick Part No. X0797

PIN SPRING STOP

Purchase Orders No.	Date	Quantity	Date of 1st deliv	Shipments 1941	12-1-41 to 4-30-42	5-27-42 to 11-30-42	1943	1944	1945	Packard	Cancelled
[illegible] 771	3-17-41	50000	6-21-41	477738						3050	
X4425	1-15-42	28704	6-20-42			442485				1795	
4103	3-17-42	20500	6-20-42			398648	51347				
[illegible] 5198	4-18-42	24000	12-29-42				240000				
[illegible] 6869	7-15-42	66100	1-30-43				274439				
15536	10-5-42	20000	8-21-43				151926				
16605	1-8-43	16308	9-27-43				122876	145169			
17774	2-22-43	8500	12-14-43					89904			
19405	6-12-43	50000	2-4-44					80052			10066
21061	8-20-43	22250	4-7-44					89300			
21883	10-11-43	24450	6-29-44					77750			19510
22555	11-26-43	62	11-30-43				915				
24370	4-5-44	100	4-29-44					100			
24730	5-26-44	168	5-29-44					1644			
24943	5-28-44	11707	6-29-44					82652			
24770	5-28-44	24000	7-31-44					172400			
[illegible] 2784	[illegible]	50000	[illegible]					50000

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer Fusick Part No. 25856

SHEET OIL PLATE

Purchase Orders No.	Date	Quantity	Date of Last Assy	1942	1943	1944	1945	Previous	Current	Balance
[illegible]	3-[illegible]-41	[illegible]	[illegible]	[illegible]						
[illegible]	1-[illegible]-42	[illegible]	[illegible]							
P 3918	3-[illegible]-42	[illegible]	9-19-42							
P [illegible]	4-3-42	[illegible]	[illegible]							
P [illegible]	4-[illegible]-42	[illegible]	[illegible]							
P 6490	7-[illegible]-42	[illegible]	[illegible]							
15794	10-[illegible]-42	[illegible]	[illegible]							
16784	1-8-43	[illegible]	8-3-43							
17838	[illegible]	[illegible]	8-31-43						1799	
19509	[illegible]	[illegible]	Cancelled						[illegible]	
20116	[illegible]	[illegible]	Cancelled						[illegible]	
[illegible]	9-[illegible]-43	[illegible]	[illegible]							
21658	10-11-43	[illegible]	[illegible]						3004	
23515	[illegible]	[illegible]	[illegible]						1037	
23631	[illegible]	[illegible]	[illegible]							
25191	[illegible]	[illegible]	[illegible]							
[illegible]

AIRCRAFT & DIESEL EQUIPMENT CORP. 3820
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer BUICK

SHAFT SUPER FUEL DRAIN

| | | |

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer Buick

Part No. 24160

PLATE Super Fuel Drive VALVE

100/17

Purchase Order No.	Date	Quantity	Date of 1st Ady	Shipments 1941	1942	1943	1944	Overrun	Cancelled
P 777	3-13-41	5000	7-31-41	394 48					
P 2300	1-15-42	5301	6-30-42			310 11		1709	
P 3781	3-17-42	4600	10-28-42			483 33			
AVP-5367	4-18-42	4600	4-28-43				269 10	1662	
AVP-6560	7-15-42	7500	5-22-43				438 76		
7279	1-19-43	14340	8-27-43				477 72		
17843	2-22-43	1500	Cancelled				238 50	1322	
				394 48		793 44	1385 58	238 50	
Credit								24 57	
								213 93	

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer Buick Part No. 39078

Drawing

Purchase Order No.	Date	Quantity	Date of 1st Delv.	Shipments 1941	12-1-41 to 6-30-42	7-1-42 to 12-31-42	1943	1944	1945	Overrun	Cancellations	Balance
781	9-10-41	10000	9-9-41	19500								
2676	1-14-42	11496	6-10-42			9947						
3690	3-17-42	11500	8-28-42			11708				760		
5760	4-21-42	3000	10-29-42				2925					
6776	5-14-42	16000	5-4-43				19651					
16813	1-8-43	11000	8-30-43				11350			50		
17698	2-22-43	16500	10-14-43				4599	30191				
19788	4-14-43	16500	12-9-43					16592				
20798	5-16-43	3000	5-3-44					3000				
21819	7-12-43	16500	4-29-44					17150			1650	
22770	10-10-43	8000	6-29-44					17950			6950	
23790	2-26-44	3000	6-29-44					3050				
24084	3-22-44	3000	7-21-44					6000				
24570	4-14-44	18000	8-21-44					8250	9750			
25978	5-19-44	10000	9-18-44					9726	274			
26426	6-20-44	10000	10-16-44						10000			
27426	7-18-44	10000	11-15-44						9000			1000
28444	8-16-44	10000	12-14-44						8356			1644
29566	9-14-44	10000	1-13-45						7434			2566
30474	10-12-44	10000	2-11-45						6526			3474
31490	11-10-44	10000	3-12-45						5510			4490
32799	12-8-44	10000	4-10-45						4201			5799

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

12/17

Customer Brick

Part No. 47793

Plug

Purchase Orders No.	Date	Quantity	Date of 1st Deliv	Shipments 1941	1942	1943	1944	1945	Overrun	Cancellations	Balance
P-779	3-13-41	5000	8-7-41	28791	34709						
P-2767	1-15-42	5858	3-28-42		74397						
P-3846	3-17-42	6000	3-28-42		17421	77757					
P-5379	4-16-42	4500	9-29-42			74957			1477		
P-6908	7-15-42	10700	5-22-43				118821		1402		
17117	1-15-43	6700	9-22-43				85090			1344	
17617	2-22-43	8100	10-22-43				58852	28623			
19802	6-14-43	7800	1-31-44					54600			
21064	9-18-43	7700	3-31-44					37268			
22281	10-13-43	4000	5-27-44					6265		2376	
23424	2-28-44	4127	5-27-44					28889		3305	
24119	3-24-44	3400	6-29-44					23800			
24635	4-15-44	6700	7-31-44					38759	8141		
25315	6-2-44	2300	12-1-44						21100		
26620	7-26-44	2100	1-31-45						14700		
32456	2-23-45	4018	4-30-45						12859		
34487	3-28-45	900									2181
35637	5-5-45	500									
				28791	126347	152694	262768	218204	51800		
CREDIT MEMO								107			
								21809			

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer Dixie

Part No. 37199

Dowel Gun Drive

1 of 17

| No. | | |

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer Lewis
Order No. 37035
Valve service release

| No. | Date | Quantity | Date of Job daily | 2042 | 2044 | 2048 | 2046 | | |

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

15-17

Customer Buick Motor Div Part Number 34224
PIN CRANK SHAFT

Invoice No.	Date	Quantity	Date of Last Delivery	1942	1943	1944	1945	Overrun	Cancellations	Balance
P-783	9-10-41	500	7-31-41	49911				767		
P-2447	1-15-42	6694	5-30-42		59-30					
P-3845	3-17-42	3780	6-10-42		79135	17649				
P-4924	4-21-42	5200	7-28-42			20498				
P-6599	7-15-42	13900	2-25-43			19831				
P-16886	1-15-43	8600	9-2-43			11380				
P-17754	2-22-43	16500	10-21-43			10055			6684	
P-19488	4-12-43	8310	11-20-43			8978	170535			
P-20181	4-28-43	10900	2-17-44				59980		7162	
P-20654	8-20-43	2016	2-29-44				20356			
P-23959	9-11-44	700	9-16-44				3000			
24773	4-15-44	700	4-29-44				4700			
21603	9-29-43	18519	8-21-44				161970		4771	
21340	10-11-43	22203	2-21-44				108044			
24774	4-15-44	6600	11-2-44				8915	60551		
25579	6-8-44	1400	12-20-44					21000		
26292	7-19-44	14	8-31-44				210			
16343 MK 14313	12-7-44	2700	1-31-45					39000		
30898	12-20-44	600	2-15-45					9000		
31177	1-19-45	500	2-21-45					7000		
29998	2-28-45	16048	3-31-45					141855		6791
24176	3-19-45	500	+					-		
24704	3-30-45	500	+					-		
25771	4-8-45	600	+					-		
				69911		168405	97[illegible]	889181	771440	
CREDIT MEMO								2117		
								489370		

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AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer [illegible]

Part No. 16429

PIPE OIL SUCTION FR

Purchase Orders No.	Date	Quantity	Date of 1st dely	1941	Shipments 12-1-41 to 4-28-42	4-29-42 to 11-30-42	1943	1944				Overrun	Cancelled
P 716	3-13-41	5000	8-14-41	403.59								1117	

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer [illegible]

Part No. 79414

Pin Screw Locking

170-17

Purchase Orders No.	Date	Quantity	Date of 1st Ship	Shipments 1943	[illegible]	[illegible]	1943	1944	1945		Over Rain	Cancellations	Balance
18653	3-15-43	60200	3-29-43				85[illegible]	1293 68?					
20237	7-5-43	24395	12-16-43					24395					
21483	9-28-43	14700	3-11-44					14700					
22271	10-13-43	10500	4-4-44					10500					
25399	6-5-44	8000	6-29-44					8000					
23861	3-1-44	143596	4-24-44					143596					
24236	3-27-44	12800	7-31-44					8625	4175				
24717	4-15-44	10700	12-1-44						10700				
28543	11-20-44	3000	2-10-45						3000				
29562	12-9-44	14900										14900	
33056	2-28-45	187900	3-31-45						98840				89216
							85404	21555	11655 90				

[fol. 466] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF B. CH. KELLEHER IN RESPECT OF CHEVROLET MOTOR AND AXLE DIVISION OF GENERAL MOTORS CORPORATION—Filed July 2, 1945

B. Ch. Kelleher, being first duly sworn, on oath deposes and says that he is now and has been since June, 1940 President and General Manager of Aircraft & Diesel Equipment Corporation (herein called "Plaintiff").

Affiant further says that:

(1) General Motors Corporation was a customer of Plaintiff from before June, 1940, through Allison Division.

(2) General Motors Corporation employed a system of purchasing whereby integral parts of that corporation made purchases and paid therefor as if much integral parts thereof were separate and independent entities, and that during the period 1941 to 1944 some of such entities were subdivided into other separate and independent entities for [fol. 467] the purpose of buying and paying for purchases as well as other purposes.

(3) Among such entities of General Motors Corporation was a division known and called Chevrolet Motor and Axle Division. This division was divided in the years 1940 to 1944 into Chevrolet Motors Division, Chevrolet Commercial Body Division and Chevrolet Motor and Axle Division. In this affidavit Chevrolet Motor and Axle Division, Chevrolet Commercial Body Division and Chevrolet Motors Division are treated as a unit and are herein called "Chevrolet".

(4) This affidavit relates solely to the relation of the plaintiff to Chevrolet, and is one of a series of affidavits made by this affiant pertaining to the contracts of Plaintiff with purchasers of its equipment.

(5) This affidavit and the supporting exhibits is made in support of Plaintiff's assertion that substantial portions of its sales made in the fiscal years ended November 30, 1942, November 30, 1943, and November 30, 1944 are not subject to renegotiation.

(6) The photostatic copies of the documents attached to this affidavit are all true and correct copies of letters or telegrams sent by Chevrolet to Plaintiff or by Plaintiff to Chevrolet.

(7) The computations attached thereto have been made under the supervision of affiant by auditors furnished by Lybrand, Ross Bros. & Montgomery, Certified Public Accountants, from the books of original entry kept and maintained by Plaintiff in the ordinary course of its business, [fol. 468] and that affiant believes all of said computations to be correct.

(8) In affiant's opinion, Plaintiff had a contract with General Motors Corporation (Chevrolet) for the purchase of aircraft parts on July 19, 1941 and at all times thereafter, and that said contract was not subject to renegotiation by reason of any subsequently enacted statute, and that the basis of such opinion of said affiant is as hereinafter set forth.

(9) Prior to June 19, 1941 Plaintiff had been selling to Chevrolet certain parts for use in aviation engines, and that sometime prior to June 19, 1941, a representative of Chevrolet called upon Plaintiff and requested quotations for the sixteen parts then being furnished by Plaintiff to Buick Motor Division of General Motors Corporation for use in the Pratt & Whitney engine.

(10) On June 19, 1941 Chevrolet wrote Plaintiff requesting a statement of the prices at which said parts were being furnished to Buick Motors Division of General Motors Corporation, a copy of which said letter is attached hereto and marked "Exhibit C-1".

(11) Thereafter, pursuant to said letter of June 19, 1941, on June 19, 1941, this affiant caused to be mailed to Chevrolet a letter of Plaintiff enclosing a statement of the prices at which said sixteen parts were being furnished to Buick Motors Division of General Motors Corporation, a copy of which said letter of June 30, 1941 and the quotations attached to such letter are attached hereto marked "Exhibit C-2" and "Exhibit C-2-A".

[fol. 469] (12) Thereafter on July 19, 1941 Plaintiff received from Chevrolet its letter of July 18 wherein Chevrolet advised Plaintiff of its engine schedule for the year 1942 and the months of January and February of 1943 and thereafter, and requested Plaintiff to advise whether it was in a position to insure delivery of these parts in time for

Chevrolet's requirements. A copy of said letter is attached hereto marked "Exhibit C-3".

(13) Thereafter on July 21, 1941 Plaintiff wrote Chevrolet advising it that the quotations contained in its letter of June 30, 1941 would be considered as binding to December 31, 1931, and increased 10% between January 1, 1942 and June 30, 1942, and 20% between July 1, 1942 and December 1, 1942 on all shipments, a copy of which said letter is attached hereto marked "Exhibit C-4".

(14) On September 12, 1941 Plaintiff wrote to Chevrolet revising its prices as quoted in its letter of June 30, 1941, a copy of which said letter of September 12, 1941 is attached hereto marked "Exhibit C-5".

(15) Thereafter on January 2, 1942 Chevrolet advised Plaintiff that it was preparing to increase the production of the Pratt & Whitney engine which would necessitate the stepping up by Plaintiff of the parts which it was furnishing. An engine schedule was given for the entire year of 1942 and the months of January to April inclusive for the year 1943, and thereafter at the rate of 2000 engines per month. Plaintiff was advised that the parts which Chevrolet was then purchasing from Plaintiff must be stepped up to meet that schedule. In the said letter Plaintiff was also advised and requested to advise as to [fol. 470] whether it could meet the increased schedule. A copy of said letter of January 2, 1942 is attached hereto and marked "Exhibit C-6".

(16) Plaintiff thereafter received from Chevrolet a letter dated March 30, 1942 again advising of an increase in the manufacturing schedule through the year 1942 to the ultimate rate of 3000 engines per month plus spares by June, 1942. It requested Plaintiff to advise as to whether it could meet these requirements (to meet the 3000 engines per month beginning June, 1942). A copy of said letter is attached hereto marked "Exhibit C-7".

(17) Later a letter was received by Plaintiff from Chevrolet, dated April 6, 1942, showing the parts Plaintiff would be required to furnish Chevrolet to handle the 3000 engine per month schedule to be reached in June, 1943. A copy of such letter is attached hereto, made a part hereof and marked "Exhibit C-8". Plaintiff replied to this letter advising Chevrolet that it would meet such schedule, and it did so.

(18) On May 25, 1942 Plaintiff received from Chevrolet a letter setting forth that on March 30, 1942 it had forwarded to Plaintiff a schedule of delivery which Plaintiff had not answered. It enclosed a copy of its letter of March 30, 1942, a copy of which said letter and attached copy is attached hereto and marked "Exhibit C-9".

(19) On June 11, 1942 Plaintiff replied to Chevrolet advising that it would accept said increased schedule and was in a position to meet said schedule.

[fol. 471] (20) Thereafter additional increases were made on some of the parts which Plaintiff was then furnishing to Chevrolet. There have been further increases in said schedules.

(21) Following the receipt of each letter requesting that the production be increased of the parts then being furnished by Plaintiff to Chevrolet, this affiant made or caused to be made a shop survey showing (a) work in production, (b) machinery on hand, and (c) personnel; and made such changes in production schedules as was necessary to insure Plaintiff being able to perform its contract for the parts required by Chevrolet in increasing amounts, as shown by Chevrolet's communications attached hereto; and, that as said increases were made, Chevrolet supplied Plaintiff with material necessary to complete its work in accordance with such increased schedules, and in excess of any so-called purchase orders then received by Plaintiff; that Chevrolet relied upon Plaintiff to supply the parts then being made by Plaintiff for Chevrolet in amounts necessary to meet said increased requirements, as a stipulation of the contract between Plaintiff and Chevrolet.

(22) On or about December 10, 1942, Plaintiff received from Chevrolet its letter with enclosures regarding renegotiation, a copy of which said letter of December 10, 1942, and enclosures are attached hereto marked "Exhibit C-10"; that pursuant to said letter of Chevrolet dated December 10, 1942, Plaintiff signed and returned to Chevrolet a copy of said letter and enclosures.

(23) On December 10, 1942 and at all times prior and subsequent thereto this affiant believed that the sales made [fol. 472] to Chevrolet under the arrangement were not subject to renegotiation, as being sales made upon a contract made prior to April 28, 1942, and that in addition,

affiant was and is informed and he believes that the provision for renegotiation in the Sixth Supplemental Defense Act was and is unconstitutional and void.

(24) In view of his belief in respect of the unconstitutionality of the Sixth Supplemental National Defense Appropriation Act, 1942, he believed and now believes that no renegotiation could be had under or pursuant to the provisions of said Act; that in any event said letter of December 10, 1942, did not authorize, direct or permit renegotiation of any sales made in the year 1943, under the terms and provisions of the Renegotiation Act adopted February 24, 1944.

Further affiant saith not.

B. Ch. Kelleher.

Subscribed and sworn to before me this 29th day of June, 1945. Clyde F. Devin, Notary Public.

[fol. 473] "EXHIBIT C-1"

CHEVROLET-MOTOR AND AXLE

Division of General Motors Corporation
P.O. Station "B," Buffalo, N. Y.

June 19, 1941.

Aircraft & Diesel Equipment Corporation
4401 N. Ravenswood Avenue
Chicago, Illinois

Attention: Mr. L. G. Simmons

Gentlemen:

Relative to your visit of a few days ago regarding the sixteen parts you are now furnishing Buick for the Pratt and Whitney engine, the writer would appreciate it if, for estimating purposes only, you would give us the Buick prices on these parts.

Thank you in advance for your cooperation in this matter.

Yours very truly, W. E. Henderson, Buyer, Purchasing Department.

WEH:vsm

[fol. 474] "EXHIBIT C-2"

June 30, 1941.

Buffalo, New York.—P.O. Station B.
Chevrolet-Motor and Axle,
Attention: Mr. W. E. Henderson—Buyer

Gentlemen:

In response to your letter of June 19, 1941, we are pleased to send you a list of the prices quoted Buick Motor Co. for the parts being made for the Pratt and Whitney engine.

We are sending you these prices to be used for estimating purposes, but will be glad to send you a formal quotation at the time you are ready to place an order.

These prices however do not include tool costs and you would have to secure Buick Company's permission to use their tools. You should be able to do this without any trouble.

We trust the enclosed list will help you in lining up your order and remain

Very truly yours, Aircraft & Diesel Equipment Corporation, L. G. Simmons—Dales Department.

LGS/gn

[fol. 475] "EXHIBIT C-2-A"

Part A-37035—Valve	
Lot 2000 pieces	$ .79 ea.
Part A-24163—Pipe	
Lot 2000 pieces	.17 ea.
Part A-25856—Shaft	
Lot 2000 pieces	.34 ea.
Part A-38899—Dowel	
Lot 4000 pieces	.06 ea.
Part A-26689—Spaces	
Lot 20,000 pieces	.06 ea.
Part A-24160—Plate	
Lot 2000 pieces	.05 ea.
Part A-1177—Insert	
Lot 4000 pieces	.30 ea.
Part A-20495—Body	
Lot 2000 pieces	1.08 ea.
Part A-18350—Plunger	
Lot 2000 pieces	.43 ea.

[fol. 476] Part A-23145—Spacer

"EXHIBIT C-2-A"

Lot 14,000 pieces	$ .08 ea.
Part A-24164—Shaft	
Lot 2000 pieces	.29 ea.
Part A-23365—Pipe	
Lot 8000 pieces	.16 ea.
Part A-16429—Pipe	
Lot 2000 pieces	.05 ea.
Part A-20140—Pipe	
Lot 4000 pieces	.05 ea.
Part A-34224—Pin	
Lot 2000 pieces	.05 ea.
Part A-20297—Pin	
Lot 12,000 pieces	.08 ea.
Part A-47793—Plug	
Lot 2000 pieces	.05 ea.

Customer to furnish, without cost, all material TO AIRCRAFT & DIESEL EQUIPMENT CORPORATION.

All prices are F.O.B., Chicago, Ill. Terms net 10th prox.

[fol. 477]

"EXHIBIT C-3"

CHEVROLET-MOTOR AND AXLE

Division of General Motors Corporation
P.O. Station "B" Buffalo, N. Y.

July 18th, 1941.

Aircraft & Diesel Equipment Corp.
4401 No. Ravenswood Avenue
Chicago, Illinois

Attention: Mr. L. G. Simmons

Gentlemen:

We have now received a tentative schedule of production for the Pratt and Whitney Model 1830-43 Engine. We are listing below parts which we desire to purchase from your company.

Part No.	Part Name	Qty. per Unit
1177	Insert	2
16429	Pipe	1

Part No.	Part Name	Qty. per Unit
20140	Pipe	2
20297	Pin	6
23145	Spacer	7
23365	Pipe	4
24160	Plate	1
24164	Shaft	1
25856	Shaft	1
26689	Spacer	10
34224	Pin	1
37035	Valve	1
39028	Dowel	2
39899	Dowel	2
47793	Plug	1

We will furnish the necessary bar stock for the production of these parts.

Approximate delivery schedule will be on the following basis:—

January	1942	5 engines
February	"	10 "
March	"	15 "
April	"	20 "
[fol. 478] May	1942	25
June	"	30 "
July	"	35 "
August	"	40 "
September	"	50 "
October	"	100 "
November	"	150 "
December	"	300 "
January	1943	600 "
February	"	900 "

Thereafter 1,000 engines per month.

Can you make the necessary arrangements to insure the delivery of these parts to us in time for our requirements?

Your early reply will be greatly appreciated.

Yours truly, R. D. Stuart, Purchasing Agent.

RDS:vsm

[fol. 479] "EXHIBIT C-4"

July 21, 1941.

Chevrolet Motor and Axle,
Division of General Motors Corporation,
Buffalo, New York.

Attn: Mr. R. D. Stuart, Purchasing Agent.

Gentlemen:

This is in answer to your inquiry of July 19th, 1941 about various parts which you want us to provide for you.

We will be glad to work for you and can assure you that if your orders are accepted by us, the delivery dates will be met. This of course is based upon your ability to furnish the material to us in sufficient time for the processing of the several parts.

The prices listed in our letter of June 30, 1941 addressed to the attention of Mr. W. E. Henderson, Buyer, may be accepted by you for all shipments made up to December 31, 1941. These prices are to be increased by 10% on all shipments between January 1, 1942 and June 30, 1942 and by 20% on all shipments between July 1, 1942 and December 31, 1942.

It should be further understood that we will be permitted to make deliveries ahead of schedule if possible. If you decide to use us as a supplier you should submit with your formal orders the date on which your material will be delivered to us in order to give the job as early a routing as possible.

We will be glad to purchase the material ourselves, obtaining the necessary affidavits for you, and charging you with the actual cost of the material plus 15% for handling.

For your information, the following paragraphs are submitted with all quotations:

"All prices are F.O.B. Chicago, Illinois. Terms, Net 10th Approx.

[fol. 480] Delivery promises are based on normal expectancy. Acts or demands of the United States Government,

fires, strikes, accidents to machinery or other causes u
avoidable or beyond our control, or the failure on th
part of the purchaser to supply necessary informatio
shall excuse any delay in delivery or any failure to fi
orders accepted. This quotation and delivery promise i
subject to change which may be scheduled for shop pro
duction if received before this order and also is subjec
to change caused by suppliers change in delivery promise
of material. It supersedes all previous quotations o
agreements.

Cancellation of orders can be made only with our con-
sent and upon terms that will indemnify us against loss.

Any quantity up to 10% in excess of or less than the
quantity ordered will be regarded as completing same.

The cost of any changes in design or specifications re-
quired by the purchaser is chargeable to the purchaser."

Trusting that we have the opportunity of serving you,
we remain

Respectfully yours, Aircraft & Diesel Equipment
Corporation, L. G. Simmons, Sales Manager.

LGS:R

[fol. 481] "EXHIBIT C-5"

September 12, 1941.

Chevrolet Motor and Axle,
Division of General Motors Corporation,
P.O. Station B, Buffalo, New York

Attention: Mr. W. E. Henderson, Buyer
Purchasing Department

Gentlemen:

This will confirm my telephone conversation with you
this afternoon and our telegram to you in which we with-
drew our quotations included in our letter of June 30,
1941.

From our experie'ce in producing these parts for Buick we find that the costs are considerably out of line and that the actual operations necessary to furnish the parts in order to pass inspection are qu[illegible] different from the operations that we felt were necessa[illegible]t the time the original quotations were issued. This additional work and the resulting additional costs make it necessary for us to issue the revised quotations on these parts, as follows:

Part No.	
1177	$34.00 per hundred pieces
16429	6.60 per hundred pieces
20140	7.00 per hundred pieces
20297	14.75 per hundred pieces
23145	10.60 per hundred pieces
23365	24.30 per hundred pieces
24160	5.85 per hundred pieces
24164	38.50 per hundred pieces
25856	41.00 per hundred pieces
26689	7.50 per hundred pieces
34224	13.30 per hundred pieces
39028	8.25 per hundred pieces
39899	9.95 per hundred pieces
47793	12.70 per hundred pieces

All prices are F.O.B. Chicago, Illinois. Terms, Net 10th Approx.

Delivery promises are based on normal expectancy. Acts or demands of the United States Government, fires, [fol. 482] strikes, accidents to machinery or other causes unavoidable, or beyond our control, or the failure on the part of the purchaser to supply necessary information, shall excuse any delay in delivery or any failure to fill orders accepted. This quotation and delivery promise is subject to change which may be caused by orders which are now pending and which may be scheduled for ship production if received before this order, and also is subject to change caused by suppliers change in delivery promises of material. It supersedes all previous quotations or agreements.

Cancellation of orders can be made only with our consent and upon terms that will indemnify us against loss.

Any quantity up to 10% in excess of or less than the quantity ordered will be regarded as completing same.

The cost of any changes in design or specifications required by the purchaser is chargeable to the purchaser.

Trusting that we may have the opportunity of serving you. We are,

Very truly yours, Aircraft & Diesel Equipment Corporation, L. G. Simmons, Sales Manager.

LGS:P

[fol. 483] "EXHIBIT C-6"

CHEVROLET-MOTOR AND AXLE

Division of General Motors Corporation
P.O. Station "B" Buffalo, N. Y.

January 2, 1942

Aircraft & Diesel Equipment Corp.
4401 N. Ravenswood Avenue
Chicago, Illinois

Gentlemen:

We are planning to increase our production of Pratt & Whitney 1830-43 engines which would eventually necessitate the stepping up of our schedules for parts which you are furnishing to us, to an ultimate peak of 2000 engines per month basis.

Delivery requirements of parts from you would be based on the following tentative engine production:

	Engines		Engines		Engines
Jan. 1942	25	July 1942	400	Jan. 1943	1200
Feb.	75	Aug.	500	Feb.	1400
Mar.	125	Sept.	600	Mar.	1600
Apr.	200	Oct.	750	Apr.	1800
May	200	Nov.	900	Thereafter	2000
June	300	Dec.	1050		

At the present time we are purchasing the following parts for this engine from you:

Part No.	Part Name	No. per Engine
177	Insert—Tachometer Drive	2
6429	Pipe	1
0140	Pipe C'Shaft	2
0297	Pin—Spring Stop	6
3145	Spacer—Push Rod	7
3365	Pipe—Crank Pin	4
4160	Plate—Lower Super Charger Drain Valve	1
4164	Shaft—Super Charger Drain Valve	1
5856	Shaft—Oil Pump Idler	1
6689	Spacer	10
4224	Pin—C'Shaft Support Plug Location	1
9028	Dowel	2
9899	Dowel	2
7793	Plug	1
8164	Spacer—Push Rod	49
7035	Valve—Compensating Relief	1
9966	Pipe	1

[fol. 484] We would appreciate a response from you at your earliest convenience to the following questions:

In the event that schedules would be increased as shown, can you assure us of your ability to furnish the increased quantity of all parts?

If your present capacity is not sufficient for such increase would you be inclined to provide the necessary tooling increase to furnish these requirements?

Based on your present capacity and what would be required to raise it to handle our requirements do you feel this can be accomplished in ample time to meet the schedules as indicated?

We request that you give this your full consideration and reply as soon as possible.

Yours very truly, J. A. Condon, Buyer—Purchasing Department.

AC:ILP

[fol. 485] "EXHIBIT C-7"

CHEVROLET-MOTOR AND AXLE
Division of General Motors Corporation

P.O. Station "B" Buffalo, N. Y.

March 30, 1942

Aircraft & Diesel Equipment Corporation
4401 No. Ravenswood Avenue
Chicago, Illinois

Att: Mr. L. G. Simmons

Gentlemen:

We propose to increase our manufacturing schedules of Pratt & Whitney engines to an ultimate of 3,000 engines per month plus spares and to coordinate all facilities for the attainment of this rate by June 1943. As you are now supplying this plant with the following parts, we desire that you make whatever arangements are necessary for accomplishing the production schedules that you will be required to meet.

Part No.	Name	No. Per Engine
20140	Pipe	2
23365	Pipe	4
26689	Spacer	10
34224	Pin	1
39028	Dowel	2
39899	Dowel	2
47793	Plug	1

Anticipated monthly schedules expressed in engines is given below for your guidance:—

April 1942	Approx.	250 Engines per month, plus spares
May	Approx.	400 Engines per month, plus spares
June	Approx.	500 Engines per month, plus spares.
July	Approx.	800 Engines per month, plus spares.
August	Approx.	950 Engines per month, plus spares
September	Approx.	1150 Engines per month, plus spares
October	Approx.	1500 Engines per month, plus spares
November	Approx.	1700 Engines per month, plus spares
December	Approx.	1900 Engines per month, plus spares

Thereafter an increasing monthly rate to 3,000 engines plus spares by June 1943.

[fol. 486] Mr. W. E. Henderson, Aviation Plant #2, Chevrolet Motor Division, Buffalo, N. Y., will advise you with regard to the following parts which you are now supplying for direct shipment to that plant.

Part No.	Name	No. Per Engine
1177	Insert	2
20297	Pin	6
23145	Spacer	7
24160	Plate	1
24164	Shaft	1
25856	Shaft	1
27035	Valve	1
48164	Spacer	49
49966	Pipe	1

Please advise regarding your ability to meet these requirements.

Very truly yours, R. D. Stuart, Purchasing Agent.

JAC/mm

[fol. 487] "EXHIBIT C-8"

Aviation Engine Plant No. 2 Chevrolet Motor Division
General Motors Corporation
Buffalo, New York
1001 East Delavan Avenue

April 6, 1942.

Aircraft & Diesel Equip. Corp.
4401 N. Ravenwood Avenue
Chicago, Ill.
Gentlemen:

Our ultimate monthly schedule of Pratt & Whitney engines has been increased from 2,000 to 3,000 per month plus spares. The 3,000 per month rate will be reached by June 1943.

We are listing below the parts you are now supplying and a figure opposite each part that will be multiplied by the factor opposite each month to determine the amount required for each month.

Will you kindly advise if you will be able to handle this increase?

Part No.	Name	Figure
#1177	Insert	222
20297	Spring	639
23145	Spacer	765
24160	Plate	113
24164	Shaft	113
25856	Shaft	115
37035	Valve	110
48164	Spacer	5342
49966	Pipe	1060

April —1942	Factor 2.5	September—1942	Factor 11.5
May —1942	Factor 4.	October —1942	Factor 15.
June —1942	Factor 5.	November—1942	Factor 17.
July —1942	Factor 8.	December—1942	Factor 19.
August—1942	Factor 9.5		

Thereafter, an increasing monthly rate to a factor of 30 by June 1943.

Yours very truly, Aviation Engine Plant #2, Chevrolet Motor Division, W. E. Henderson, Purchasing Agent.

WEH/mk

[fol. 488] "EXHIBIT C-9"

CHEVROLET-MOTOR AND AXLE
Division of General Motors Corporation
P.O. Station "B" Buffalo, N. Y.

May 25, 1942.

Aircraft & Diesel Equipment Corporation
4401 N. Ravenswood Avenue
Chicago, Ill.

Att: Mr. L. G. Simmons

Gentlemen:

The attached letter which we sent you on March 30th it is apparent from our files, has not been replied to. We would appreciate very much an expression of your intention to prepare to meet our ultimate engine schedules as covered by this letter.

Thanking you for an early reply, we remain,

Very truly yours, J. A. Condon, Asst. Purchasing Agent.

JAC/mm
Encl-2

[fol. 489] March 30, 1942.

Aircraft & Diesel Equipment Corporation
4401 N. Ravenswood Avenue
Chicago, Illinois

Att: Mr. L. G. Simmons

Gentlemen:

We propose to increase our manufacturing schedules of Pratt & Whitney engines to an ultimate rate of 3,000 engines per month plus spares and to coordinate all facilities for the attainment of this rate by June 1943. As you are now supplying this plant with the following parts, we desire that you make whatever arrangements are necessary for accomplishing the production schedules that you will be required to meet.

Part No.	Name	No. Per Engine
20140	Pipe	2
23365	Pipe	4
20689	Spacer	10
34224	Pin	1
39028	Dowel	2
39899	Dowel	2
47793	Plug	1

Anticipated monthly schedules expressed in engines is given below for your guidance:—

April 1942	Approx. 250 Engines per Month, Plus Spares
May	Approx. 400 Engines per Month, Plus Spares
June	Approx. 560 Engines per Month, Plus Spares
July	Approx. 800 Engines per Month, Plus Spares
August	Approx. 950 Engines per Month, Plus Spares
September	Approx. 1150 Engines per Month, Plus Spares
October	Approx. 1500 Engines per Month, Plus Spares
November	Approx. 1700 Engines per Month, Plus Spares
December	Approx. 1900 Engines per Month, Plus Spares

Thereafter an increasing monthly rate to 3,000 engines plus spares.

Please advise regarding your ability to meet these requirements.

Very truly yours, R. D. Stuart

[fol. 490] "EXHIBIT C-10"

CHEVROLET-MOTOR AND AXLE
Division of General Motors Corporation
P.O. Station "B" Buffalo, N. Y.

December 10, 1942.

Aircraft & Diesel Equipment Corp.
4401 N. Ravenswood Avenue
Chicago, Ill.
Gentlemen:

This is to advise you that the Government prime contracts listed below have been issued to Chevrolet Motor Division, General Motors Corporation and are subject to renegotiation as set forth in the Sixth Supplemental National Defense Appropriation Act approved April 28, 1942.

Contract No: W-535-AC-19997(5210)
Contract No: W-535-AC-24931
Contract No: W-535-AC-29294
Contract No: W-535-AC-35325(9485)

In order that we may comply with the provisions of each of the above Government contracts, it is necessary that we request you to agree that the Renegotiation Agreement attached hereto, marked Chevrolet Form No. AV-408, is

applicable to and a part of all purchase orders issued to you by Chevrolet Motor & Axle Division, Chevrolet Motor Division, General Motors Corporation, and shall be applicable to and a part of all purchase orders hereafter to be issued to you by Chevrolet Motor & Axle Division which purchase orders show or may show any one or more of the above contract numbers and equal or exceed an amount of $100,000.

In order that we may secure your acceptance to the above understanding, it is requested that you sign and return to us one copy of the Renegotiation Agreement attached hereto, retaining the duplicate copy for your file.

Very truly yours, R. D. Stuart, Purchasing Agent.

JAC/U

CHEVROLET-MOTOR AND AXLE
Division of General Motors Corporation
P.O. Station "B" Buffalo, N.Y.

Chev. Form No. AV 408

RENEGOTIATION AGREEMENT

ARTICLE:- Renegotiation Pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942.

It is agreed by and between General Motors Corporation, Chevrolet Motor & Axle Division, hereinafter referred to as Buyer and Aircraft & Diesel Equipment Corporation, hereinafter referred to as Seller, that the following understanding is hereby made a part of all purchase orders issued to you by General Motors Corporation, Chevrolet Motor & Axle Division applying on all Government contracts as follows:

Contract No. W-535 AC 19997 (5219)
Contract No. W-535 AC 24931
Contract No. W-535 AC 29294
Contract No. W-535 AC 35325 (9485)

1. Upon the written demand of the Secretary, at such period or periods when, in the judgment of the Secretary, the profits accruing to seller, under this contract can be determined with reasonable certainty, the Secretary and seller, will renegotiate the contract price to eliminate therefrom any amount found as a result of such renegotiation to represent excessive profits. The demand of the Secretary shall fix a place for renegotiation and a time for the commencement thereof not later than one year after the date of completion or termination of this contract as found by the Secretary.

2. Seller will furnish to the Secretary such statements of actual costs of production and such other financial statements, at such times and in such form and detail as the Secretary may prescribe, and will permit such audits and inspections of its books and records as the Secretary may request.

3. Any amount of the contract price found as a result of such renegotiation to represent excessive profits shall, as directed by the Secretary,

(a) Be deducted by buyer from payments otherwise due to seller under this contract, or
(b) Be paid by seller directly to the Government.

4. Seller agrees that buyer shall not be liable to seller for or on account of any amount paid to the Government by seller or deducted by buyer from payments otherwise due under this contract, pursuant to directions from the Secretary in accordance with the provisions of this Article. Under its contract with the Government, buyer is obligated to pay or credit to the Government all amounts withheld by it from seller hereunder.

5. As used in this Article:

(a) The term Secretary means the Secretary of War or any duly authorized representative of the Secretary, including the contracting officer,

(b) The terms "renegotiate" and "renegotiation" have the same meaning as in Section 403 (b) of the Sixth Supplemental National Defense Apprppriation Act, 1942.

(c) The term "this contract" means this contract as modified from time to time.

GENERAL MOTORS CORPORATION
Chevrolet Motor & Axle Division

By (Signed) J.C.A. Condon
Asst. Purchasing Agent

Accepted this 29th day of December, 1942
AIRCRAFT & DIESEL EQUIPMENT CORPORATION

By (Signed) T.J. Murphy
T. J. Murphy, Comptroller

Title _____

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Chevrolet Motors Division
RECAP - SALES.

Part No	Model and Order	Description	SHIPMENTS 11-1-42 to 11-30-42	12-1-42 to 12-31-42	Nov 30 1942	Nov 30 1943	May 31 1944	Total	SHIPMENTS ON ORDERS RECEIVED Prior to Jan 1 1942	Jan 1 to June 30 1942	1942	Total	Orders Pending Dec 31 1942
1173	TA 24	Journal Tailshaft Brg	3060	4856	1497614			1719470	308070	976550		1284620	191690
11350	PA 1375	Plunger			190640			190640					190640
20140	TA 24	Pipe Crank Adapt	5760	4752	1202560			1644512	87304	1120976		1208280	436232
20197	TA 24	Pipe Spring Stop	14760	18768	796968			2011437	447744	670752		1118496	892941
23185	TA 24	Spacer	17760	13200	1228248			1659192	439704	1279488		1719192	960000
23265	TA 24	Pipe Crank Pin	15120	17760	1254864			1677744	345168	1332576		1677744	771432
24160	TA 24	Plate Lower Support Changer Drain Valve	1680	1440	97920			209520	91680	70800		162480	47040
24164	TA 24	Shaft	6720	6480	376320			1344240	274032	1040208		1314240	29998
27256	TA 24	Shaft Oil Pump Idler	6720	3840	384000			1276320	91611	1184709		1276320	1000000
26689	TA 24	Spacer	9180	5280	1098240			1468320	348037	1120283		1468320	769991
34424	TA 24	Fly Crank Adapt Support Plug Locating	1680	1080	69120			161760	10560	151200		161760	6912
37035	TA 24	Valve	2760	720	141120			309360	91680	217679	1680	311039	1679
37048	TA 24	Dowel	6960	1680	672000			1552800	360480	1192320	1680	1554480	1680
38889	TA 24	Dowel	2880	6720	252000			667680	55200	612480		667680	1680
47793	TA 24	Plug	1440	2640	168960			403200	120960	276240	4800	402000	1200
48154	TA 24	Spacer	9240	12720	1247520			3151440	1141920	1969920	9600	3121440	30000
49614	BA 144	Pipe	1200	1200	96000			192000					192000
79414	7826930	Ball Bearing											
			39915	78937	2196944			5759435	3915171	4757639	78183	8750993	5959435

Customer Chevrolet

4401 Ravenswood Avenue
CHICAGO, ILL.

Job's No. 1177

2 of 17

No.			Date of Last Order					Location of Order Card	Pieces Over-run	Pieces Cancelled	Part Number Also Listed
TA-25	9-19-41	2800	1-26-42		95200						201409 202979
BA-149	11-21-41	4200	2-7-42		142800						202979
BA-176	3-16-42	3500	3-16-42		98090	20910					202979
BA-1241	1-30-42	7825	5-20-42			245250			216		202979
BA-1241	5-8-42	4700	10-27-42			159800					241607
BA-9016	6-15-42	34600	11-21-42			159256	1012044				
BA-15707	1-22-43	6775	9-28-43				230360				202979
BA-24830	8-23-43	4793	2-29-44					32406			
BA-15757	2-27-43	20000	10-29-43				258970	458116	37025		
					336090	565410	1577864	784224			

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AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer Chevrolet

Part No. 18350

Purchase Order No.	Date	Quantity	Date of 1st Daily	Shipments 1941	1942	1943	1944	Location of order card	Pieces over-run	Pieces cancellation	Part Number Also Listed	
BA 9175	12-7-42	5000	1-8-43			3837 60						
BA 15745	2-2-43	5000	3-19-43			3778 40						
BA 15757	2-27-43	25000	7-20-43			11290 40	5049 28			5339		
TA 37226	1-29-44	8839	1-25-44				5214 71	20297				
BA 24830	8-23	3500								3500	24164	25856
						19106 40						

Customer Chevrolet

Automotive & Diesel Equipment Corp.
4401 Ravenswood Avenue
CHICAGO, ILL.

Part No. 20140

Purchase Order No.	Date	Quantity	Date of 1st Delivery	1941	Shipments 1942	1943	1944	Location of order card	Pieces over-run	Pieces cancellation	Part number as Listed
TA-170	11-26-41	4200	2-18-42		2940 00						23365-
TA-1324	2-18-42	500	2-18-42		350 00						23365-
TA-1457	1-19-42	3200	2-18-42		2240 00						23365-
TA-30099	2-16-42	7500	3-14-42		1240 4	400 96					23365-
TA-30411	5-4-42	4800	11-21-42			192 64	1433 6				23365-4
TA-32775	7-4-42	33000	11-17-42			39 76	8702 4			20000	
33408	7-29-42	1900	3-31-43				1322 3				
TA 33677	8-22-42	20000	4-3-43				1400 00				
TA 34255	10-6-42	4300	5-15-43				201 77				
TA 34256	10-6-42	2700	6-24-43				189 00				
TA 32775	11-17-42	568	11-17-42			39 76					23365-4
TA 35036	1-6-43	10000	6-28-43				709 58				
TA 30963	2-24-43	28500	10-4-43				1556 17	44555			
TA 32331	6-29-43	18000	2-10-44					9100 0		5000	
TA 35753	8-21-43	15000	4-19-44					10500 0			
TA 25	9-19-41	2800	2-6-42		196 00				1177		
TA 33408	7-29-42	1900							25856	1900	
					8730 4	673 12	5302 35				

5719

Customer Chevrolet

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Part No. 20297

											Location of Kardex card	Pieces every-run cancellations	Part Number Also Listed
BA-9090	8-18-42	12000	12-31-42					1770 00					18350 4
BA-15757	2-27-43	9000	10-11-43					1327 50					
15897	6-17-43	11000	10-15-43					1622 50					
BA 24830	8-23-43	21095	11-18-43					5856	1772 72				
BA 29082	1-13-44	29600	3-16-44						2368 00				
TA 25	9-19-41	8900	1-26-42		1312 75						1177		
BA 149	11-21-41	12100	1-31-41		1597 74		1625 01				1177		
BA 176	1-12-42	9100	4-30-42				1342 25				1177		
BA 1121	1-30-42	21050	5-7-42				3104 88				1177		
BA 15707	1-22-43	15250	1-26-43					1898 18			1177		
BA 9016	6-15-42	39600	10-24-42				3343 68	2497 32			2416 0		
					1472 49		9415 82	9696 06					

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AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

[illegible] Chevrolet

[illegible] No. 23145

[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	Pieces over-run	Pieces Cancellation	Part Number Also Listed
TA-25	9-19-41	9800	2-9-42		1038 80						23365-24160-24164
BA-149	11-21-41	14700	3-9-42		140 45	1417 75					24160
BA-176	1-12-42	11700	4-29-42			1240 20					24160-24160
BA-1121	1-30-42	25050	5-22-42			2155 30					24160
15952	5-19-42	17500	5-29-42			1855 00					
32774	7-3-42	112000	7-16-42			2729 29	1912 67				
TA 33204	7-13-42	4800	11-4-42			508 80				68000	
TA 33678	7-31-42	68000	7-31-43				7299 94				
TA 34346	10-7-42	25500	11-7-42			2913 94					
TA 34347	10-7-42	4500	8-31-43				289 59		1990		
34788	11-27-42	307000	9-9-43				32547 28				
TA 34876	12-8-42	45000	11-22-43				4770 00				
TA 31139	2-27-43	329500	11-27-43				8102 96	16032 73			
TA 34787	3-24-43	309970	3-25-43				32845 05				
TA 32078	5-7-43	36000	5-15-43				111 78			40	
TA 32309	6-29-43	531000						23895 00			
TA 31593	3-26-43	9200	4-9-43				844 75				
					1179 25	13320 28	88723 82				

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AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer Chevrolet

Part No. 23365

Purchase Order No.	Date	Quantity	Date of 1st Duty	Shipments 1941	1942	1943	1944	Location of order card	Pieces over-run	Pieces cancellation	Part Number Also Listed
										41000	
TA 32846	7-6-42	67000	10-13-42		5683.04	-658.53					
TA 33672	8-25-42	41000	3-22-43			7760.96					
TA 34012	9-12-42	11500	7-29-43			2794.51					
TA 34013	9-12-42	3000	8-12-43			729.00					
TA 34135	9-23-42	40000	8-26-43			8132.08					
TA 34131	9-23-42	10000	11-20-43			2430.00					
TA 31102	2-26-43	47000	11-23-43			330.72	8319.81				
TA 32498	5-20-43	6000	6-2-43			1458.00					
TA 32238	6-5-43	3200	6-16-43			777.60					
TA 32302	6-8-43	6100	6-19-43			ct. 2237.55 1482.30					
TA 32310	6-29-43	25000	2-23-44				5277.84				
TA 35929	8-28-43	23000	4-15-44				1905.56				
TA 170	11-26-41	8500	2-28-42		2065.50			20140			
TA 1324	12-27-41	900	3-2-42		218.70			20140			
TA 1457	1-19-42	6000	3-9-42		1458.00			20140			
TA 30099	2-16-42	14500	4-11-42		72.41	3451.09		20140			
TA 30471	5-4-42	10000	10-13-42			2430.00		20140			
P.O. 32346	11-17-42	188	11-17-42			45.68		20140			
TA 25	9-19-41	5600	2-9-42		1397.98			23145	153		
TA 33407	7-29-42	3800	3-20-43			923.40		23365			
					5212.59	5926.77	25238.55				

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer *Chevrolet* Part No. *24160* 8-19

Purchase Order No.	Date	Quantity	Date of 1st Daily	1941	Shipments 1-[illegible]-41 4-[illegible]-42	6-[illegible]-42 11-[illegible]-42	1943	1944	Location of Order Card	Pieces over-run	Pieces cancellation	Part Number Also Listed
BA-9016	6-15-42	17000	10-6-42			99450						202977
BA-9090	8-15-42	600	11-28-42			3510						241644 37035
BA-15849	5-8-43	10000	5-26-43				65216			1148		
P 86808	3-24-44	2000									2000	
BA 1241	5-8-42	2400	10-3-42			15900			1177			
TA 25	9-19-41	1500	1-12-42		11115				23145	400		
BA 149	11-21-41	2000	1-12-42		11700				23145			
BA 176	1-12-42	1850	3-13-42		8576	2246			23145			
BA 1121	1-30-42	3700	7-30-42			21645			23145			
					31391	142751	65216					

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AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer Chevrolet Part No. 24164

[illegible] No.	Date	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	Location of order card	Pieces over-run	Pieces cancellation	Part Number Also Listed
BA-149	11-21-41	2000	3-31-42		770 00							25856
BA-1122	1-30-42	3700	6-6-42			1424 50						25855, 37035, 49966
BA-1241	5-8-42	2400	11-21-42			924 00						25856
BA-9016	6-15-42	17000	11-28-42			971 36	5559 85					37035
BA 15707	1-22-43	2500	10-6-43				962 51					
BA 15757	2-27-43	12000	10-29-43				630 25	1753 75			2738	25856
29128	1-24-44	4100									4100	
BA 24830	8-23-43	3250							18350		3250	
TA 25	9-19-41	1500	2-7-42		577 50				23145			
BA 176	1-12-42	1850	4-28-42		32 73	679 53			23145			
BA 9090	8-15-42	500	10-6-43				192 50		24160			
					1379 23	3999 39	7673 85					

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer Chevrolet

Part No. 25856

Purchase Order No.	Date	Quantity	Date of 1st Ship	1941	Shipments 1942	1943	1944	Location of order card	Pieces over run	Pieces Cancellation	Part Number Also Listed
TA 25	9-19-41	1500	2-11-42		615.00						26689, 34224, 37035
BA 175	1-12-42	2000	3-27-42		820.00						37035
TA 32773	7-4-42	19800	10-28-42			936.85	2666.64			11000	
TA 33408	7-29-42	1300	6-30-43				533.00				20140
BA 9103	8-19-42	2000	10-31-42			384.58	435.42				
TA 33773	8-22-42	11000	6-30-43				4479.25				
TA 34257	10-6-42	800	10-14-43				328.00				
TA 34258	10-6-42	1200	10-14-43				492.00				
TA 34257	10-6-42	800									26689
TA 34258	10-6-42	1200								1200	26689
24829	8-23-43	2050	4-24-44				1291.50				37035
BA 24830	8-23-43	3400						18350		3400	
BA 149	11-21-41	2000	3-13-42		820.00			24164			
BA 1122	1-30-42	3750	3-31-42		1221.39	316.11		24164			
BA 1241	5-8-42	2350	10-21-42			975.80		24164	30		
BA 15757	2-27-43	10000	10-16-43				2602.27	2301.39	24164		
					3476.39	2613.34	11536.58				

Customer Chevrolet — UNIVERSAL DIESEL EQUIPMENT CORP. 1401 Harmonwood Avenue CHICAGO, ILL. — Part No. 26689 — 11 1 2

Purchase Order No.	Date	Quantity	Date of 1st Rely	Shipments 1941	1942	1943	1944	Location of order card	Pieces Every-Run Cancellation	Part Number Also Listed
TA 170	11-26-41	19500	1-23-42	146250						
TA 1324	12-27-41	1500	1-26-42	11250						34224?
TA 1457	1-19-42	15000	4-25-42	44363	68137					
TA 30199	2-16-42	37000	4-30-42		277500					34224?, 39028
TA 30471	5-4-42	24000	11-11-42		12585	163290				34224?
TA 32826	7-9-42	154000	3-6-43			446627			97000	
TA 33508	8-13-42	21500	4-29-43			161251				
TA 33675	8-25-42	97000	5-27-43			727373				
TA 34257	10-6-42	29000	9-13-43			217501				
TA 34258	10-6-42	25000	10-7-43			187500				
TA 35638	1-6-43	12000	10-29-43			90090				
TA 35639	1-6-43	22000	10-29-43			165001				
TA 31108	2-26-43	139000	11-6-43			528063	411882			
TA 32458	7-5-43	144000	1-20-44				864000			
TA 25	9-19-41	15500	1-17-42	116250						
TA 34257	10-6-42	29000							25856	
TA 34258	10-6-42	25000							25856	
									25856	
				318413	358222	2486606				

Customer Electronic [illegible] JUIPMENT CORP. Part No. 34-24

4401 Evenerwood Avenue
CHICAGO, ILL.

Purchase Order No.	Date	Quantity	Date of 1st Delivery	Shipped 1941	1942	1943	1944	Location of Order Card	Pieces over-run	Pieces Cancellation	Part Number Used
TA - 170	11-26-41	1800	2-22-42		10175	13765					39028
TA - 1457	1-19-42	1750	5-29-42			23275					39028, 39897, 47793
152360	6-20-42	129	7-8-42			1716					
TA 32763	7-3-42	22000	2-28-43				133080			12000	
TA 33512	8-13-42	800	5-29-43				10640				
TA 33717	8-24-42	12000	5-31-43				204617				
TA 35042	1-6-43	10000	9-21-43				21000				
TA 31112	2-26-43	11300	9-22-43				237300				
TA 32099	5-20-43	1535	5-29-43				20416				
TA 32549	7-5-43	18500	11-18-43				242556	364245			
TA 25	9-19-41	1790	1-31-42		22610				25856		
TA 1324	12-27-41	758	5-29-42			9975			24689		
TA 30099	2-16-42	3800	8-8-42			50540			24689		
TA 30471	5-4-42	2500	8-8-42			31428	18224		24689		
					32785	130699	653050				

13 N 19 C

Customer Chevrolet

UNDERWOOD ... EQUIPMENT CORP.
... Ravenswood Avenue
CHICAGO, ILL.

Part No. 37035

[illegible] No.	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	Location of Order card	Pieces over-run	Pieces Cancellation	Part Number Also Listed
BA 149	11-21-41	2000	3-24-42		1580 00							499664
BA 1241	5-8-42	2400	12-24-42				1896 00					
BA 15723	1-25-43	7000	8-12-43				5510 24					11770
BA 15757	2-27-43	16000	11-11-43				1625 82	12966 06				
24830	8-23-43	4350	3-31-44					46 50			4300	
BA 9090	8-18-42	4500	6-25-43				3468 01		24160			
BA 1122	1-30-42	3600	4-16-42		2163 02	3 16	677 82		24164			
BA 9016	6-15-42	14300	1-6-43				11231 68		24164			
TA 25	9-19-41	1500	2-10-42		1185 00				25856			
BA 175	1-12-42	1700	4-7-42		1343 00				25856			
24829	8-23-43	700	3-31-44					651 00	25856			
45235	?	?	?				294 67					
45472	?	?	?				7 90					
					6271 02	3 16	24712 14					

Customer Chevrolet

QUIPMENT CORP
4401 Ravenswood Avenue
CHICAGO, ILL.

Part No. 39028

14 [illegible] 79

[illegible] No.	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	Location of order card	Pieces over-run Cancellation	Part Number Also Listed
TA- 25	9-19-41	2900	1-30-42		239 25						39899; 47793; 48164
TA - 1399	1-12-42	500	2- 7-42		41 25					12000	39899; 47793
TA -32764	7- 3-42	16000	3-25-43				330 01				
TA 33716	8-24-42	12000	7-15-43				990 01				
TA 35041	1- 6-[illegible]	1000	10-22-43				82 50				
TA 32199	6-29-43	6000	10-22-43				495 00				
TA 35538	8- 9-43	17400	11-29-43				8 49	1536 48			
TA 36843	12-14-43	1400	3-30-44					126 00			
36996	1-22-44	14000	3-30-44					1260 00			
TB 30099	2-16-42	7500	4-25-42		81 59	44 95	486 68		26689		
TA 170	11-26-41	4100	1-30-42		338 25				34224		
TA 1457	1-19-42	3100	2- 7-42		255 75				34224		
					956 09	44 95	2392 69	2962 48			

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AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer Chevrolet

Part No. 39899

[illegible] No.	Date	Quantity	Date of 1st Ship	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	Location of Order card	Pieces over-run	Pieces Cancellation	Part Number Also Listed
TA-170	4-26-41	4100	1-22-42		407 95							47793
TA-30099	2-16-42	7500	7-16-42			746 25						47793
TA-32765	7-3-42	33000	7-31-42			65 87	1227 62				20000	
TA 33548	8-13-42	700	7-10-43				69 65					
33714	8-22-42	20000	7-10-43				1989 99					
TA 34266	10-6-42	600	10-29-43				59 70					
TA 34265	10-6-42	400	10-29-43				39 80					
TA 31141	2-27-43	15800	10-29-43				1196 99	468 98				
TA 30471	5-4-42	5000	7-23-42			497 50						
TA 32548	7-3-43	28000	12-31-43					2800 00				
TA 1457	1-19-42	3100	4-20-42		242 18	66 27			34224			
TA 25	9-19-41	2900	1-17-42		328 45				39028	401		
TA 1399	1-12-42	500	1-22-42		[illegible]9 75				39028			
					1028 33	1375 89	4583 75					

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer Chevrolet

Part No. 47793

Purchase Order No.	Date	Quantity	Date of 1st dely	1941	Shipments 12-1-41 to 4-[illegible]-42	4-[illegible]-42 to 11-[illegible]-42	1943	1944	Location of order card	Pieces over-run	Pieces Cancellation	Part Number Also Listed
TA-32827	7-4-42	8000	3-30-43				822 73				1500	
TA-33407	7-29-42	800	8-17-43				101 60					23365
TA-36624	8-25-42	1500	9-18-43				190 50					
TA-31138	2-27-43	1000	9-22-43				127 00					
TA-32198	6-29-43	4000	9-22-43				508 00					
TA-35539	8-9-43	8300	11-27-43				124 21	512 89				
TA-36998	1-21-44	[illegible]000	3-25-44					490 00				
TA-1457	1-19-42	[illegible]50	3-14-42		210 82				34224	10		
TA-25	9-19-41	[illegible]0	1-22-42		190 50				39028			
TA-1399	1-12-42	250	3-14-42		31 75				39028			
TA-170	11-26-41	2000	1-22-42		254 00				39899			
TA 30099	2-16-42	3700	3-20-42		36 20	410 34	23 37		39899			
					723 27	410 34	1897 41					

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

[redacted] Chevrolet

[redacted] 48164

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[redacted] No.	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	Location of Order card	Pieces over-run	Pieces cancellation	Part Number Also listed
BA-149	11-21-41	103200	4-18-42		3588 82	5492 78						
BA-175	1-12-42	81000	7-31-42			7128 00						49964
BA-1122	1-30-42	174850	9-26-42			8640 63	662296					
TA-15952	5-19-42	122500	6-10-43				1077062					
TA-32828	7-4-42	770000	7-15-43				2639960				470000	
TA-33202	7-13-42	36000	10-23-43				317600					
TA-33673	8-25-42	470000									470000	
TA-34259	10-6-42	33000									33000	
TA-34260	10-6-42	37000									37000	
TA-34787	11-26-42	507000	12-9-42				2988375				309970	Transferred to part 23145
TA-34875	12-9-42	70000	11-11-43				616001					
TA-31140	2-27-43	327000	11-30-43				69766	1659028				
TA-25	9-19-41	68300	2-10-42		601040				39028			
					959922	21261 41	8371060					

Customer Cavalet

[illegible] EQUIPMENT CORP
4401 Ravenswood Avenue
CHICAGO, ILL.

Part No. A-49966

18 19

Purchase Order No.	Date	Quantity	Date of 1st Deliv.	Shipments 1941	[illegible]	[illegible]	1942	1944	Location of Order Card	Pieces over-run	Pieces cancellation	Part Number Also Listed
82376	6-12-42	16800	8-22-42			67617	43179					
82590	7-27-42	3000	5-8-43				19619					
82625	8-28-42	2395	5-10-43				15807					
82767	11-7-42	6714	6-14-43				44268					
83419	1-2-43	1679	9-2-43				11079					
83600	2-22-43	8896	9-2-43				58815					
84016	7-10-43	10287	11-4-43				18413	53522				
84407	7-28-43	9153	3-6-44					73224				
BA 1122	1-30-42	3500	2-18-42		23100				24164			
BA 149	11-21-41	3500	2-9-42		23100				37035			
BA 175	1-12-42	1500	2-18-42		9900				48164			
					56100	67617	211171	126746				

[illegible] EQUIPMENT CORP
4401 Ravenswood Avenue
CHICAGO, ILL.

19 - 19

Customer Chevrolet

Part No. 79414

Purchase Order No.	Date	Quantity	Date of 1st Ship	Shipments 1941	[illegible]	[illegible]	1943	1944	Pieces Over-run	Cancellation	Also Listed
TA-36973	1-8-44	21000	1-31-44					210000			
TA-37352	2-29-44	2700	5-9-44					27000			
								237000			

[fol. 511] In United States District Court

[Title omitted]

[File endorsement omitted.]

Affidavit of B. Ch. Kelleher in respect of General Motors Corporation (Allison Division) — Filed July 2, 1945.

B. Ch. Kelleher, being first duly sworn, on oath deposes and says that he is now and has been since June, 1940 the President and General Manager of Aircraft & Diesel Equipment Corporation; that this affidavit pertains only to the relations of Aircraft & Diesel Equipment Corporation (herein called "Plaintiff") with the Allison Engineering Division of General Motors Corporation (herein called "Allison"); that this is one of a series of affidavits made by this affiant pertaining to the contracts of Plaintiff with purchasers of its equipment, and this affidavit and the exhibits attached hereto are made in support of the position of Plaintiff that a substantial portion of its sales made in the fiscal years ended November 30, 1942 and November 30, 1943 are not subject to renegotiation.

[fol. 512] Affiant states that:

(1) The photostatic copies of documents attached to this affidavit are all true and correct copies of letters or telegrams sent by Allison to Plaintiff or by Plaintiff to Allison; that the computation attached hereto and made a part hereof, marked "Exhibit A-X", has been made, under the supervision of affiant, by auditors furnished by Lybrand, Ross Bros. & Montgomery, Certified Public Accountants, from the books of original entry kept and maintained by plaintiff in the ordinary course of business, and that affiant believes all of said computation to be correct.

(2) In affiant's opinion Plaintiff had a contract with Allison for the purchase of aircraft parts on January 13, 1942, and that at all times thereafter; that said contract was not subject to renegotiation by reason of any subsequently enacted statute; and that the basis of said opinion is as hereinafter set forth.

(3) Prior to December 10, 1940 Plaintiff had been selling to Allison certain parts for use in aviation engines upon orders placed for such parts and pursuant to ship-

ping schedules furnished to Plaintiff by Allison as is shown by the letter of December 6, 1940 and the schedule attached thereto, copies of which are attached hereto, marked "Exhibit A-1" and "Exhibit A-1-A"; and the reply of Plaintiff to Allison dated December 10, 1940, a copy of which is attached hereto and marked "Exhibit A-2".

(4) Thereafter, during the year 1941 and prior to December 10, 1941, the Plaintiff continued to manufacture various parts for aviation engines for Allison after making quotations upon said parts and having the same accepted by Allison.

(5) On December 10, 1942, Plaintiff received a telegram [fol. 513] from Allison advising that under orders of the War Department Allison was required to increase its production and to immediately commence operation on a twenty-four hour day, seven day week basis. Plaintiff was directed by Allison to do the same, i.e., commence operation on a twenty-four hour day, seven day week basis, in order to insure delivery of the parts necessary to meet its schedules. A copy of such telegram dated December 10, 1941 is attached hereto and marked "Exhibit A-3". Immediately upon receipt of said telegram dated December 10, 1941 Plaintiff telegraphed to Allison advising it that pursuant to its telegram, Plaintiff would operate on a twenty-four hour day, seven day week basis, starting December 11, 1941, and that Plaintiff was ready to cooperate to the best of its ability with Allison; a copy of which said telegram dated December 11, 1941 is attached hereto and marked "Exhibit A-3-A".

(6) Thereafter on January 12, 1942 Plaintiff received a letter from Allison advising Plaintiff that the Air Corps (United States Army) required Allison to materially increase production of Allison Liquid Air-cooled Aircraft Engines. Plaintiff was directed to survey its production facilities and give the data requested as to delivery schedules on the parts which Plaintiff was then making for Allison, a copy of which said letter from Allison to Plaintiff, dated January 12, 1942, is attached hereto and marked "Exhibit A-4", together with the carbon copy of said schedule received and enclosed with the Allison letter.

(7) On January 13, 1942, following receipt of said letter from Allison, Plaintiff advised Allison that in answer to [fol. 514] its said inquiry dated January 12, 1942, it had

studied said schedule, and it was prepared to produce the quantities shown in columns one and two of such schedule, which were necessary to insure Allison fulfillment of its requirements, a copy of which said letter of Plaintiff to Allison, dated January 13, 1942, is marked "Exhibit A-5" and made a part hereof.

(8) On or about March 6, 1942 Plaintiff received from Allison its letter of March 6, 1942, requesting information on the attached questionnaire relative to the facilities of Plaintiff to insure delivery of the quantity of parts that Allison would be required to meet on a monthly schedule, a copy of which said letter is attached hereto and marked "Exhibit A-6".

(9) Thereafter, on March 10, 1942, Plaintiff acknowledged said letter and advised that it was prepared to meet the schedule as set forth.

(10) Thereafter, on or about August 24, 1942, Plaintiff received a letter from Allison dated August 24, 1942 giving a new schedule of parts requirements then being manufactured by Plaintiff for Allison, which letter requested an acknowledgement of the fact that Plaintiff would be able to maintain the shipping schedule on the parts therein mentioned, a copy of which said letter is attached hereto and marked "Exhibit A-7" and made a part hereof.

(11) Thereafter Plaintiff, by letter, advised Allison of its ability to meet the increased requirements provided materials were received from the American Brass Com-[fol. 515] pany by September 5, 1942, a copy of which letter is attached hereto and marked "Exhibit A-8", and made a part hereof.

(12) Thereafter on or about October 15, 1942, Plaintiff received from Allison its letter of October 15, 1942, again requesting information as to the ability of Plaintiff to produce the quantities required on a monthly basis, a copy of which said letter is attached hereto, made a part hereof, and marked "Exhibit A-9".

(13) Thereafter on October 19, 1942, Plaintiff replied to said letter (Exhibit A-9), advising Allison that it was complying with the schedule of production, and that it was prepared to take care of Allison's requirements.

(14) Thereafter on December 8, 1942, Plaintiff received from Allison a further letter requesting confirmation of its ability to meet shipping schedules of the parts then being

manufactured by Plaintiff for Allison, in order to permit Allison to maintain its schedule, a copy of which said letter, dated December 8, 1942, is attached hereto, made a part hereof, and marked "Exhibit A-10".

(15) Upon receipt of said letter (Exhibit A-10) Plaintiff advised Allison, by letter dated December 9, 1942, copy of which is attached hereto, made a part hereof, and marked "Exhibit A-11", that it had reviewed its facilities for the production of Allison's parts and was prepared to produce at the peak figures set out in its letter of December 8, 1942, and was able to maintain said schedules.

(16) Folowing receipt of said telegram of December 10, 1941 (Exhibit A-3), and following each wire and letter [fol. 516] or telephone call thereafter, giving the increase of the schedules of parts then being made by Plaintiff, this affiant made, or caused to be made, a shop survey showing work in production, prior orders, machinery on hand, and available skilled personnel, and made such changes in production schedules, machinery and personnel as was necessary to insure Plaintiff's performance of its contract with Allison for the parts then being manufactured for Allison in the increased amounts and in accordance with schedules furnished by Allison.

(17) Allison relied upon Plaintiff to supply the parts then being made for Allison in the amounts necessary to meet all increased requirements, and all as a part of said contract of January 13, 1942, with the increased amounts only.

(18) On or about July 25, 1942, Plaintiff received from Allison a notice addressed to all vendors, stating that the sales made by Plaintiff as a subcontractor were subject to renegotiation under the Sixth Supplemental National Defense Appropriation Act, a copy of which said notice is attached hereto and marked "Exhibit A-12"; that pursuant to Allison's letter Plaintiff signed and returned to Allison the agreement requested, a copy of which is not now available; that on July 25, 1942, and at all times prior and subsequent to that date, this affiant believes that the sales made to Allison under the arrangement aforesaid were not subject to renegotiation, since they were all sales on a contract made prior to April 28, 1942.

(19) In addition, affiant was informed and believes that the terms and provisions for renegotiation appearing in

the Sixth Supplemental National Defense Appropriations [fol. 517] Act of 1942, as such, were and are unconstitutional, null and void, and in view thereof, no renegotiation could be had on or pursuant to said Act; and, that in any event said letter of July 25, 1942 did not authorize, direct or permit renegotiation of any sales made in the year 1943 under the terms and provisions of the Renegotiation Act of February 24, 1944.

Further affiant saith not.

B. Ch. Kelleher.

Subscribed and sworn to before me this 29th day of June, 1945.

Clyde F. Devin, Notary Public.

[fol. 518] "EXHIBIT A-1"

ALLISON ENGINEERING COMPANY
Division of General Motors Corporation
Indianapolis, Indiana

December 6, 1940.

Diesel Equipment Corp.
4401 Ravenswood Avenue
Chicago, Ill.

Gentlemen:

We are attaching hereto our shipping schedule #9 on which we have listed all orders placed with your company on which we show a quantity due. On all orders against which you have made a partial shipment, we have shown the quantity still oweing us after consideration of the invoice bearing the date shown in the column "Date of Last Invoice".

It is essential that you check these orders and quantities advising us of any discrepancy as we are now in the process of setting up new records and for us to intelligently calculate our future requirements, it is extremely necessary that your records and ours be in exact accord.

Thanking you for your cooperation, we are,

Yours very truly, R. H. Ross, Follow-up Department.

RHR/mlr
Enc. (1)

(Here follows 1 photolithograph, side folio 519.)

3421

SHIPPING SCHEDULE
See note below.

ALLISON DIVISION
General Motors Corporation
P.O. Box 894, Indianapolis, Indiana

Diesel Equipment Corporation
4401 North Ravenswood Avenue
Chicago, Illinois

Date 12-6-40 Sch. No. 9

Actual Schedule for December

Tentative Schedule for January

Part No. or Material Size	Purchase Order No.	Quantity	Date of Last Inv.	Period Schedule Week Beginning 12-9	Period Schedule Week Beginning 12-16	Period Schedule Week Beginning 12-23	Period Schedule Week Beginning 12-30	Period Tentative Schedule Week Beginning 1-6	Period Tentative Schedule Week Beginning 1-13	Period Tentative Schedule Week Beginning 1-20	Period Tentative Schedule Week Beginning 1-27	Balance Not Specified
33473	14234	7 591	11/11	4 000	3 591							
	22751	19 000			-	4 000	3 000	4 000	4 000	4 000		
33620	23065	3 000		3 000								
36337	22753	1 800		800	1 000							
37146	22755	2 527	12/3	1 527	1 000							
37612	22756	3 688	12/3	2 000	1 688							
33397	28891	2 000						500	500	500	500	

Note

1 You are authorized to purchase raw material only to the extent of our orders which are to be fabricated and supplied in accordance with our formal release.

2 This release supercedes all previous instructions and will be effective until further schedules are issued.

3 Material must be shipped in accordance with this release. Overshipments or undershipments on purchase orders and releases will not be a accepted unless mutually agreed upon.

4 Material returned for credit on account of rejections is not for replacement, but may be shipped after re-operation and applied against release in effect if original quantity on order is not overshipped.

5 Retain this release for your files. Acknowledge promptly. In event of error or misunderstanding, communicate with us immediately.

Address your reply to

ALLISON DIVISION

Follow Up Department

Form 311

REC'D December 10, 1940

[fol. 520] "EXHIBIT A-2"

December 10, 1940.

Allison Division,
General Motors Corp.
P.O. Box #894
Indianapolis, Ind.

Attention: Mr. R. H. Ross, Follow-up Dept.

Gentlemen:

We acknowledge receipt of your schedule #9 dated December 6th, 1940 covering your December and January schedules.

We will ship as follows:—

Part #	P.O. No.	Quantity due 12/10/40	Last shipment	Will Ship in Dec.
33473	14234	7,391	11/11/40	12,000 minimum
33473	22751	19000	.....	starting 12/14/40
33620	23065	2782	12/5/40	2782
36337	22753	1800	.....	1800
37146	22755	730	12/9/40	750
37612	22756	2662	12/6/40	2052
33397	23691	2000	.....	Ship Jan.

In reviewing the above you will note that we will meet your requirements on all items and assure you our best possible cooperation on expediting your orders as per your schedule requirements.

Yours very truly, Aircraft & Diesel Equipment Corporation, Carl H. Vaupei, Sales Manager.

CHV:bd

[fol. 521] "EXHIBIT A-3"

1941 Dec. 10 PM 8 54

NDA 1052 126 NT-WUX Indianapolis Ind 30
Aircraft and Diesel Equipment Corp:
4401 North Ravenswood Ave. Chgo.

We have been instructed by the War Department to increase the manufacture of munitions by going at once to a twenty — day seven days a week. And you are hereby directed to do the same. Please advise us at once the man hours per week and number of shifts per day under which

you are now operating on our parts and how long it will take to step up to the basis above indicated. It is contemplated that the increased hours will add to the cost of the work you are doing. However you are to proceed at once to carry out the order and advise us immediately what effect there will be on cost so the same can be negotiated and agreed upon.

Cruzan Allison Division GMC.

[fol. 522] "EXHIBIT A-30"

December 11, 1941.

Allison Division,
General Motors Corporation,
Mr. Cruzan,
Indianapolis, Ind.

Retel twenty four hour day seven days starting today ready to cooperate to the best of our ability.

Aircraft & Diesel Equipment Corporation, B. Ch. Kelleher, Pres.

[fol. 523] "EXHIBIT A-4"

ALLISON DIVISION
General Motors Corporation
Indianapolis, Indiana

January 12, 1942.

Aircraft & Diesel Equipment Co.
4401 North Ravenswood Avenue
Chicago, Illinois
Gentlemen:

We have been requested by the Air Corps to materially increase our production of Allison Liquid Cooled Aircraft engines and in order to give them an accurate answer quickly, we are asking you to go over your production facilities and give us the data requested on the attached schedule of parts you are now making for us.

On this schedule, we have shown the production requirements in 2 or 4 columns. We would like to have informa-

tion on how soon you can produce the quantities in each column.

Should you find it necessary to increase your machine tools or other manufacturing facilities, please write us in detail what this expansion might be and how soon you can get ready to produce the quantities as shown, especially those shown in columns 2, 3 or 4.

This list is furnished to you in duplicate and we are asking that you return one copy to us immediately with the desired information.

We are asking that you give this your immediate attention so that we may give the Air Corps the desired information.

Very truly yours, Allison Division, General Motors Corporation, B. L. Cruzan.

BLC/em

(Here follows 1 photolithograph, side folio 524.)

SUPPLIER: Aircraft & Diesel Equipment Co.

ADDRESS: Chicago, Illinois

Part No.	Name	Col. 1	Col. 2	Col. 3	Col. 4	REMARKS
19222	Cap-Gun Sync. Gen. Dr.	250	250			
33598	Sleeve-Backfire Sc. Rivet	3800	4700			
36337	Retainer-Rear Br. Screen	1600	2000			
37399	Body-Vent 1/2 pipe thr.	1500	1900			
37612	Washer-Distrib. Finger Dr.	3100	3800			

We can start producing monthly quantities shown in:

Column 1 By: ~~immediately~~ February 1, 1942

Column 2 By: ~~immediately~~

Column 3 By:

Column 4 By:

If additional explanation is required, please advise us in detail in separate letter.

ALLISON DIVISION GENERAL MOTORS CORP.

Date January 12, 1942 Signed: _____

[fol. 525] "EXHIBIT A-5"

January 13, 1942.

Allison Division,
General Motors Corporation,
Indianapolis, Ind.

Attention—Mr. B. L. Cruzan

Gentlemen:

In answer to your inquiry of January 12, 1942, we are please' to enclose herewith schedule which we have filled in to show that we can produce the quantities shown in columns 1 and 2, monthly starting February 1, 1942.

We will not require any additional machine tools or other manufacturing facilities.

Very truly yours, Aircraft & Diesel Equipment Corporation, B. Ch. Kelleher, President.

BChK:M

[fol. 526] "EXHIBIT A-6"

ALLISON DIVISION
General Motors Corporation
Indianapolis, Indiana

March 6, 1942.

Diesel Equipment Company
Chicago, Illinois
Gentlemen:

For immediate revision of our engine production schedule, we must again ask you to give us information requested on attached questionnaire concerning your facilities for delivering the quantities of parts we will require to meet the monthly schedule.

Please give this your immediate attention, wiring us in as much detail as possible and confirm later.

If unable to consider the entire quantities shown, advise your peak monthly quantities with present facilities and state machine tool requirements of additions are necessary.

Very truly yours, Allision Division, General Motors Corporation, B. L. Cruzan.

BLC:eb

[fol. 527] "EXHIBIT A-7"

ALLISON DIVISION
General Motors Corporation
Indianapolis, Ind.
In reply refer to P. J. Messick

August 24, 1942.

Aircraft & Diesel Equipment Corp.
4401 N. Ravenswood Avenue
Chicago, Illinois

Attention: Mr. Kelleher

Gentlemen:

We wish to thank you for the cooperation you have given Mr. Worland in the past. Your account has been assigned to Mr. P. J. Messick who will handle it in the future.

Referring to our shipping schedule number 8 dated 8/12/42 please amend the schedule with our recent orders to read as follows:

	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	Bal.
Order No. B33849—Dated 8/19/42 on 1,300 pieces of Part #41536	100	100	100	300	300	300	100
Order No. B33848—Dated 8/19/42 on 1,950 pieces of Part #41505							1950
Order No. B33847—Dated 8/19/42 on 51,500 pieces of Part #37612		5400	5700	7800	7800	7800	27000
Order No. B33418—Dated 8/17/42 on 23,500 pieces of Part #36337			2000	3800	3800	3800	10100

Please acknowledge the fact that you will be able to maintain the above shipping schedule on parts mentioned.

Thanking you in advance for your cooperation.

Yours very truly, C. M. Jessup, Manager, Material Procurement Division, Frank J. Giorganni, Supt. Material Control.

PJM:cc

[fol. 528] "EXHIBIT A-8"

September 5, 1942.

Attn: Mr. F. J. Giorganni, Supt. Material Control
Allison Division
General Motors Corporation
Indianapolis, Indiana

Gentlemen:

This is in answer to your letter of recent date regarding the status of your orders.

P. O. No.	Part	Quantity	
10918	37612	11,755	Material on hand will be delivered as per schedule.
33847	37612	51,500	Order for material placed with Republic Steel. Delivery promise not yet received.
10095	36337	4,206	Delivery of material promised for 9/8
33418	36337	23,500	
33849	41536	1,300	Material delivery promised for 9/5.
17512	41505	2,700	Material for parts.

41653 ring, 41649 valve; 41652 spring, 40517 plug on hand 44' of material 41519 nut on hand which is sufficient for about 50% of order, not yet able to place order for the balance. Material for 40516 body has been on order with American Brass since April, present indications are that delivery *may* be made this month.

If we receive the material from American Brass by September 15th, 1942, we believe that your requirements will be met in accordance with your schedule.

Very truly yours, Aircraft & Diesel Equipment Corporation, B. Ch. Kelleher, President.

BChK:rf

[fol. 529] "EXHIBIT A-9"

ALLISON DIVISION
General Motors Corporation
Indianapolis, Indiana
In reply refer to C. J. Kelly

October 15, 1942.

Aircraft & Diesel Equipment Co.
4401 North Ravenswood Avenue
Chicago, Illinois
Gentlemen:

We are attaching to this letter two copies of surveys made by us as regards our requirements of parts you have been manufacturing for us.

We ask that you kindly make a thorough investigation of your facilities to produce these parts in quantities shown and indicate on the original copy, which is to be returned to us, in the space provided headed columns 1, 2 and 3, just how soon these quantities can be produced by you on a *monthly* basis.

If additional facilities are required by you to produce the quantities indicated in the three different columns, advise us in a separate letter the facilities required for each and every part number separately.

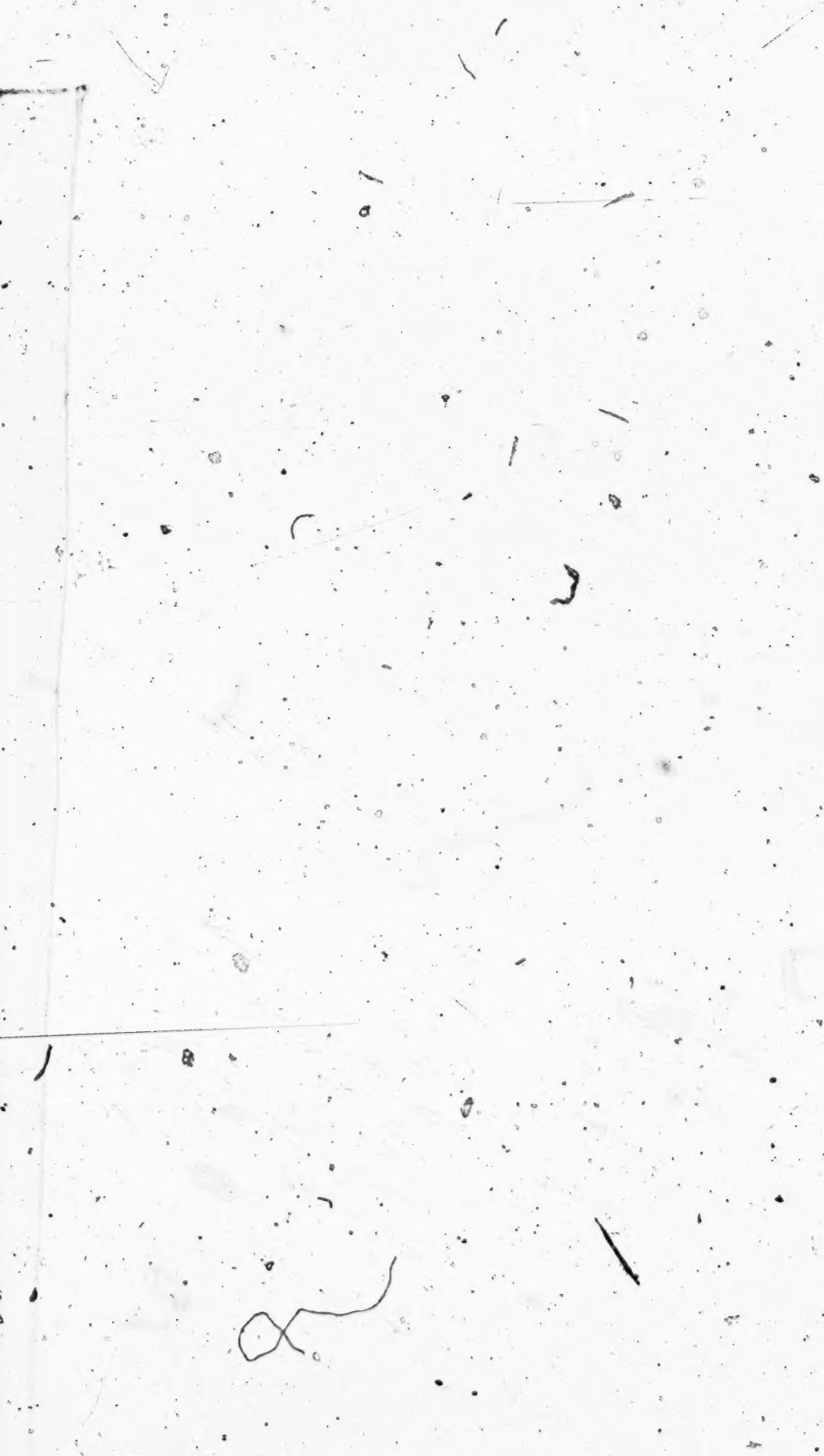
We ask that you please give the attached survey your closest attention and give us the information in detail as it pertains to producing each item on the list in accordance with the quantities indicated.

We ask you please handle this matter as promptly as you possibly can, so to insure its return to the writer's attention at the very earliest possible moment.

Yours very truly, C. M. Jessup, Manager, Materiel Procurement Division, Purchasing Agent.

jl
Enc. (2)

(Here follows - photolithograph, side folio 530.)



SUPPLIER Aircraft & Diesel Equipment Co.
ADDRESS 4401 N. Ravenswood Avenue
Chicago, Illinois

PART NO.	NAME	COL. 1	COL. 2	COL. 3	COL. 4	REMARKS
36337	Rotainer	2784	2784	3144		
37612	Washer	8682	8682	10326		
41505	Valve Assem.	1650	2178	2672		
41536	Plug	1562	1562	1738		
41654	Cap	2310	2310	2860		
41709	Jet	1430	1430	1513		

We can start producing monthly quantities shown in:

Column 1 By: _____

Column 2 By: _____

Column 3 By: _____

Column 4 By: _____

If additional explanation is required, please advise us in detail in separate letter.

ALLISON DIVISION, GENERAL MOTORS CORP.

Date _____ Signed _____

[fol. 531] Supplier: Aircraft & Diesel Equipment Corp.

Address: Chicago, Ill.

Part No.		Col. 1	Col. 2
33598	Sleeve-Backfire Screen Rivet	9200	12,300
36337	Retainer-Rear Breather Screen	2300	3,100
37612	Washer-Distr. Finger Dr.	4000	5,300

We can start producing monthly quantities shown in: Column 1 by: April 1942. Column 2 by April 1, 1942.

[fol. 532] October 19, 1942.

Allison Division
General Motors Corporation
Indianapolis, Indiana

Attention: Mr. C. J. Kelly

Gentlemen:

In accordance with request contained in your letter of October 15, 1942, we are returning herewith schedule of production of your parts on which we have indicated that we shall be able to take care of your requirements.

Trusting that will answer your questions, we are

Yours very truly, Aircraft & Diesel Equipment Corporation, L. G. Simmons, Sales Manager.

LGS:mgt
Enc.

[fol. 533] "EXHIBIT A-10"

ALLISON DIVISION
General Motors Corporation
Indianapolis, Indiana
In reply refer to C. J. Kelly

December 8, 1942.

Aircraft & Diesel Equipment Company
4401 N. Ravenswood Avenue
Chicago, Illinois

Gentlemen:

We are listing in this letter the parts which you are now manufacturing for us. You will note that the following list is in two different columns, namely; Column 1 to apply during the first few months of 1943, and the increase to Column 2 to be gradual, month by month, until the peak figures of Column 2 are reached, possibly about July or August of 1943:

Part Number	Column 1	Column 2
36337	2088	3062
37612	5009	9524
41505	297	2178
41536	213	1562
41654	330	2310

The above list is not in any way to be construed as a schedule but is being given you so that production facilities can be planned and checked carefully so that your facilities will be in agreement with the above list. Shipment will be expected in quantities as shown on our official schedule mailed to you by our Materiel Control Department.

We would like very much for you to inspect this list carefully and advise us if you have the necessary production capacity and/or facilities to produce the peak figures shown on the above list. In other words, these are the amounts that we expect you to produce for us, and if you know of anything, after carefully checking your facilities, that will prevent you from proceeding along the lines in-

dicated on this list, kindly see that we are advised immediately.

Yours very truly, C. M. Jessup, Manager, Materiel Procurement Division, C. J. Kelly, Purchasing Agent.

[fol. 534] "EXHIBIT A-11"

December 9, 1942.

Allison Division
General Motors Corporation
Indianapolis, Indiana

Attention Mr. C. J. Kelly, Purchasing Agent

Gentlemen:

Reference is made to your letter of December 8, 1942. We have carefully reviewed our facilities for the production of your parts and, as a result thereof, believe that we shall be able to produce the peak figures as set out in your letter—at least at the present writing we can not foresee anything that might prevent this and we can assure you that we will use our utmost endeavor to so serve you.

Yours very truly, Aircraft & Diesel Equipment Corporation, T. J. Murphy, Comptroller.

TJM:mgt

[fol. 535] "EXHIBIT A-12"

ALLISON DIVISION
General Motors Corporation

July 25, 1942.

To all Vendors:

Subject: Renegotiation Provisions of Sixth Supplemental National Defense Appropriation Act, 1942 (Section 403 (a) of Public Law 528, 77th Congress, Approved April 28, 1942.

Your attention is directed to the above article which is now made a part of our government contracts and which

provides for renegotiation of prices by and between the government and the contractor.

It also requires that all subcontractors participating in the contract to the extent of $100,000.00 or more be made subject to the same provisions of the act as it applies to renegotiation of prices and elimination of excess profit.

You are requested to acknowledge your acceptance of the conditions imposed upon you as a subcontractor by signing and returning to us promptly the agreement below.

C. M. Jessup, Manager, Materiel Procurement Division, C. H. Verborg, Purchasing Agent.

192

CLERK'S COPY 74958 Sup. Ct.

Vol. II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 95

AIRCRAFT & DIESEL EQUIPMENT CORPORATION, APPELLANT,

vs

MAURICE HIRSCH, E. D. McDOUGAL, JOHN R. PAUL, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

FILED MAY 1, 1946.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 95

AIRCRAFT & DIESEL EQUIPMENT CORPORATION, APPELLANT,

vs.

MAURICE HIRSCH, E. D. McDOUGAL, JOHN R. PAUL, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

VOL. II

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCT. 2, 1946.

—6903

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AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Allison Division of General Motors

PART NO	DESCRIPTION	1939	1940	1941			1942	7/31/42	TOTAL				1943	TOTAL
36337	Retainer Rear Breather Screen	90...	418	855	416	1645	1081		4061	1983	416	830		1237
36539	Bracket Fuel Pump Drive Shaft Bearing	418	1040	451					1637	427				427
37126	Power Gear Rear Drive Shaft Gear	490	3987	86	108				4279	3397	108			3505
37617	Washer Lower Finger Driver	3468	4707	1999	1866	3016	3328		10961	6034	1866	1813		9713
19777	Cam Spur Impeller Gear		2695	381	1298				4091	2811	1298			4109
37399	Body Water			2670	1430	1793			1989	2670	1430	1793		5893
41652	Cap Aux. Supr Oil Press Relief				428	506	7467		1302		428	665		1093
41709	Tee Aux. Supr Charger Check Filter				1440	5288			1728		1440	5288		6728
41647	Spring Aux Supr Oil Press Reliev/Valve						1170	1395	2565					
41705	Valve Piston Aux Supr Charger Pressure Relief					3	4	11	18			3	1815	1818
33473	Nut Ign. Cable Tube	1987	4010	1136					1496	1496				1496
33598	Sleeve Rack fire Screw Mount		1966	1309	874				5350	1508	874			2382
33670	Tryol Pressure Reinforcer Nut Plug Lock		210	71					281	131				131
33397	Sleeve Tube Driver Gear			701					701					
41536	Plug Oil Seal					7	15		22			6		6
40516	Body Aux. Supr Oil Press Relief Valve						4	35	39					
40517	Plug Aux Supr Oil Press Relief Valve						4	11	15					
41597	Nut Oil Press Valve Spr Lock						2	8	10					
41649	Valve Aux. Supr Oil Press. Relief.						8	37	45					
41648	Ring Oil Press. Relief Valve Stop													
536.7	Valve Assm Aux Supr Oil Press													
		7108	26344	6459	4390	7513	10819	4695	37555	18157	4390	3755	1815	13154
						3755	1815							
						1884	8864							
						4390								
						3755								
						1815								
						10215								

Allison Div

Customer General Motors Corp

4401 Ravenswood Avenue
CHICAGO, ILL.

Part No. 36337

| | | |

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer Allison Div General Motors Corp

Part No. 36539

SPACER FUEL PUMP DRIVE SHAFT BEARING

Purchase Order No.	Date	Quantity	Date of 1st Deliv	1941	Shipments 1942	1943	1944	1940	1939		Over Run	Cancelled
a 3005	5-6-40	1000	5-29-40					321.00			70	
a 15267	8-20-40	350	10-29-40					132.30			28	
a 22754	10-11-40	600	11-19-40					411.60			576	
38753	9-1-39	300	9-26-39						69.00			
41089	11-7-39	316	11-20-39						72.68			
42380	12-8-39	600	5-28-40					180.00				
a 52237	5-15-41	1000	5-28-41	451.00							100	
		4166		451.00				1044.90	141.68		774	

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer Allison div General Motors Corp

Date Rec'd 3/14/46

Drawing Gear & Pump Driver Shaft Cage

| No. | | |

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Roosevelt Avenue
CHICAGO, ILL.

allison Div
Customer General Motors Corp
Date No. 3761X

Washer Dist. Finger Dr

| | | |

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Allison Div

Customer General Motors Corp

Part No. 192 v v

Cap Sys. Impulse Eng.

Purchase Order No.	Purchase Order Date	Quantity	Date of 1st Daily	Shipments 1941	12-1-41 to 4-30-42	5-1-42 to 11-30-42	1943	1944	1945	Am Rem	Cancelled
a 390 v	5-15-40	500	6-19-40						537	v v 5	
a 1705d	9-9-41	1000	10-19-40						450		
a v3335	10-17-40	1800	10-30-40						630		
a v4544	10-24-40	500	11-29-40						737	75 1	
B 9v08	3-10-41	1600	3-v-41		985 60					160	
a 31 v85	12-16-40	350	1-9-41	344 00						50	
4v580	12-8-39	1650	4-30-40						548 00		
46931	4-12-41	469	4-16-41	157 97						1 v7	
a 73199	11-13-41	700	12-16-41		1100 00						
78v13	12-15-41	300	12-30-41		110 00						
		8069		3819 7	1096 60				1996 60	1 201	

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Allison Div
[redacted] General Motors Corp

[redacted] 37399

24-22

Body Vent

[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	Over Run	Cancelled
a 63118	8-16-41	11000	10-18-41	3969.04	1413.97	1193.54			1355	

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Allison Div
Customer General Motors Corp

Part No. 41654

CAP AUX Super Oil Press Relief

Purchase Order No.	Date	Monthly	Date of 1st Delay	1941	Shipments [illegible]	[illegible]	1943	1944	Over Runs	Cancelled
B 10282	3-16-42	2700	4-28-42		48675	506550			665	
B 46310	11-4-42	6300	4-30-43				746790			1774
		9000								

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Part No. 41709

Customer Allison Div General Motors Corp

JET AUX Supercharger Clutch Filler

Purchase Order No.	Date	Quantity	Date of 1st Deliv	1941	Shipments 1942 4-[illegible]-42	Shipments 1942 11-[illegible]-42	1943	1944					Over Rem	Cancelled
B10283	3-16-42	2700	4-27-42		1240 36	5588							246	

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Allison Div
Customer General Motors Corp

Part No. 41652

10/22

Spring Aux Supr Oil Press Relief Valve

[illegible] No.	Date	Quantity	Date of 1st daily	1941	Shipments [illegible]	[illegible]	1943	1944							Over Run	Cancelled
B 48690	11-14-42	10000	12-9-42				417 42	139 58								700

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Allison Div
General Motors Corp.

Item No. 41505

Valve Assembly Safety Check Pressure Relief

| No. | | |

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Allison Div
Customer General Motors Corp

Part No. 33473

Not Ign. Cable Tube

Purchase Order No.	Date	Quantity	Date of 1st Delay	1941	[illegible]	[illegible]	[illegible]	[illegible]	1940	1939	Over Run Cancelled
a 3007	5-6-40	2000	6-8-40						958 60		395
a 14234	8-13-40	10000	8-16-40	3037 40					963 60		
a 15638	8-22-40	5000	10-24-40						2000 00		
a 22751	10-11-40	19000	12-23-40	8328 80							1822
38753	9-1-39	800	9-26-39							1987 2	28
42380	12-8-39	2000	12-30-39						4800 00		
		38800		11366 20					4401 60	1987 2	2245

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Allison Div. General Motors Corp

Sleeve Back fire Screw Right

| | | |

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Allison Corp

Customer General Motors Corp

Part No. 33620

Key Oil Pressure Relief Valve Adj Plug Lock

Purchase Order No.	Date	Quantity	Date of 1st Daily	1942	Shipments [illegible]	[illegible]	1943	1944	1940	Over Run Cancelled
A 23.65	10-14-40	3000	12-5-40	92169						1389
4 2380	12-8-39	1000	3-23-40						21000	350
		4000		92169					21000	1739

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Allison Div
Customer General Motors Corp

Part No. 33397

Sleeve Tacho Drive Shaft

Purchase Order No.	Date	Quantity	Date of 1st Daily	1941	[illegible]	[illegible]	1942	1944	Over Run	Cancelled
A 28891	11-[illegible]-40	2000	1-28-41	3054.48					314	
A 41058	2-[illegible]-41	3000	3-21-41	3465.00					300	
46930	4-12-41	300	4-16-41	491.40					168	
		5300		7010.88					782	

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer Allison Div General Motors Corp

Part No. 41536

Plug oil seal

Purchase Order No.	Date	Quantity	Date of 1st Sale	1941	Shipments [illegible]	[illegible]	1943	1944	Over Runs	Cancelled
C 3456	3-15-43	4000	6-18-43				3225			3570
B 10284	3-16-42	2900	4-29-42			62100			750	
B 33849	8-19-42	1300	10-16-42			10763			135	
B 41580	11-10-42	600	4-30-43				12000			
		9600				92863	15225		885	3570

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Allison Div
Customer General Motors Corp

Part No. 40516

Body Aux Supr Oil Press Relief Valve

Purchase Order No.	Date	Quantity	Date of 1st Copy	1942	Shipments [illegible]	[illegible]	1943	1944							Over Run	Cancelled
C 3122	3-15-43	600	4-28-44					52500								500
C 41023	12-2-43	140	4-28-44					73500								
B 60858	1-29-43	1250	2-27-43				425200	2310								
		1990					425200	357000								

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer Allison Div General Motors Corp

Part No. 40517

18 of 24

Plug Aux Super Oil Press Relief Valve
Over Run Cancelled

Purchase Order No.	Date	Quantity	Date of 1st dely	1941	Shipments 12-1-41 to 4-28-42	Shipments 4-29-42 to 11-30-42	1943	1944	
C 41022	12-2-43	36	3-25-44					1800	
B 60859	1-29-43	1250	2-29-43				40500	9500	250
		1286					40500	11300	

[illegible]CRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

( ) Customer _____

Part No. #1519

Nut Oil Press Valve Spr Lock
Over Run Cancelled
755

Purchase Order No.	Date	Quantity	Date of 1st daily	1941	Shipments 12-1-41 to 4-28-42	Shipments 4-29-42 to 11-30-42	1943	1944
3455	3-15-43	2000	11-17-43				240	49760
C 42203X	12-8-43	869	4-28-44					34760
B 59933	1-23-43	1200	2-07-43				48000	
		4069					48240	84520

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Allison Div
Customer General Motors Corp

Part No. 41649
Valve Aux Supply Oil Pressure Relief

Purchase Order No.	Date	Quantity	Date of 1st daily	1941	Shipments 12-1-41 to 4-[illegible]-42	Shipments 4-[illegible]-42 to 11-[illegible]-42	1943	1944
C 6494	4-5-43	2500	8-31-43				61840	188160
D 9074	3-20-44	1850	4-28-44					137480
C 42456 X	12-11-43	1301	3-25-44					104080
		5651					61840	379720

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

allison div
General Motors Corp

Part No. 416 S3

Ring Oil Pressure Relief Valve STOP
Over Runs Cancelled

B-8691	11-14-44	3250	12-9-45				10576	

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Allison Div
Co. [illegible] General Motors Corp

Part No. 53617

[illegible] No.	[illegible]	Quantity	Date of [illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
C 34946	11-6-43	1000	12-27-43					805000

[fol. 558] IN UNITED STATES DISTRICT COURT

[Title omitted]

[File endorsement omitted.]

AFFIDAVIT OF B. CH. KELLEHER IN RESPECT OF UNITED STATES NAVY DEPARTMENT—Filed July 2, 1945

B. Ch. Kelleher, being first duly sworn, on oath deposes and says that he is now and has been since June 1940, the President and General Manager of Aircraft & Diesel Equipment Corporation; that this affidavit pertains solely to the relations of Aircraft & Diesel Equipment Corporation (hereinafter called "Plaintiff") with the United States Navy Department; that this affidavit is one of a series of affidavits made by this affiant pertaining to the contracts of Plaintiff with purchasers of its equipment; and this affidavit and the exhibits attached thereto are made in support of the position of Plaintiff that a substantial portion of its sales made in Plaintiff's fiscal years ended November 30, 1942 and November 30, 1943, are not subject to renegotiation.

[fol. 559] Affiant further states that:

(1) The photostatic copy of the document attached to this affidavit is a true and correct copy of the supplemental contract dated August 17, 1942, marked "Exhibit N-1" and made a part hereof.

(2) The computation attached hereto has been made under the supervision of affiant, by auditors furnished by Lybrand, Ross Bros. & Montgomery, certified public accountants, from the books of original entry kept and maintained by Plaintiff in the ordinary course of business, and affiant believes all of said computation to be correct.

(3) In affiant's opinion plaintiff had a contract with the United States Navy Department dated May 21, 1941, for the purchase of certain fuel injection pumps; that the supplemental contract, dated August 17, 1942, was supplemental to and a part of the contract of May 21, 1941; that said contract of May 21, 1941, as supplemented by the one dated August 17, 1942, was not subject to renegotiation by

reason of any subsequently enacted statute; and that the basis of said opinion is as hereinafter set forth.

(4) On or about May 21, 1941, Plaintiff entered into a contract with the United States Navy Department, Contract Nos 86075, by which contract the Plaintiff was required to furnish to the United States Navy Department certain fuel injection pumps; that pursuant to the terms and provisions of that contract the plaintiff shipped to the United States Navy Department during the year 1941 a total of $1,178; and during the year 1942 and after April 28, 1942, shipped the additional amount of $64,790 of its said products.

(5) On August 17, 1942, at the request of the United States Navy Department Plaintiff made and entered into a supplemental contract, bearing date, August 17, 1942, [fol. 560] which was supplemental to Contract Nos 86705, dated May 21, 1941, whereby Plaintiff agreed to furnish to the United States Navy Department pumps and injectors to the total amount of $246,064, as is shown by said supplemental contract, a copy of which is attached hereto and made a part hereof, marked "Exhibit N-1".

(6) Pursuant to said supplemental contract dated August 17, 1942, Plaintiff shipped to the United States Navy Department during the year 1942 a total of $71,899.00 of its products, and during the year 1943, shipped, pursuant to such supplemental contract, $174,165.00 of its products.

(7) Affiant is informed and believes that the terms and provisions in respect of renegotiation appearing in the Sixth Supplemental National Defense Appropriation Act of 1942 was and is unconstitutional, null and void, and in view thereof, no renegotiation could be had under and pursuant to provisions of said Act.

(8) In any event, said contract of May 21, 1941, and any supplement thereto did not authorize, direct or permit renegotiation of any sales made in the year 1943 under the terms and provisions of the Renegotiation Act adopted February 24, 1944; that if any form of renegotiation be proper under said contract of May 21, 1941, and the supplemental contract of August 17, 1942, then said renegotiation must be in strict conformance with the terms and provisions of said supplemental contract of August 17, 1942.

(9) No attempt has been made to renegotiate said contract under and in accordance with the terms and provisions relative to renegotiation appearing in said contract of August 17, 1942.

Further affiant saith not.

B. Ch. Kelleher.

Subscribed and sworn to before me this 29th day of June, 1945. Clyde F. Devin, Notary Public.

N. S. A. Form 235

CONTRACTOR'S COPY
NOT TO BE RETURNED

This is your official copy of the contract. The ORIGINAL contract only is signed by the parties. Signatures are not required on the contractor's copy.

NOa-86075

Supplementary Contract NOa-86075

CONTRACT

(Supplies)

NAVY DEPARTMENT
BUREAU OF SUPPLIES AND ACCOUNTS

AIRCRAFT & DIESEL EQUIPMENT CORP.
(Contractor)

Contract for EQUIPMENT, ADECO, ETC. Amount, $ 246,064.00

Place RESIDENT INSPECTOR OF NAVAL MATERIAL, ST. LOUIS, MISSOURI

THIS SUPPLEMENTARY CONTRACT, entered into this 17th day of August 194 2, by the UNITED STATES OF AMERICA, hereinafter called the Government, represented by the contracting officer executing this contract, and AIRCRAFT & DIESEL EQUIPMENT CORP. a corporation organized and existing under the laws of the State of DELAWARE ~~a partnership consisting of~~ ~~an individual trading as~~ of the city of CHICAGO 4401 N. Ravenswood Ave., in the State of ILLINOIS hereinafter called the contractor, witnesseth:

WHEREAS, the parties have heretofore entered into a contract numbered NOa-86075 and dated 21 May, 194 1, for the purpose of providing the Navy Department with certain supplies therein described, and

WHEREAS, the Navy Department requires and the contractor is willing to furnish and deliver additional supplies similar to those described in said contract, and

WHEREAS, it is the desire of the parties that said contract, with any amendments thereto, be extended to provide for such additional supplies,

NOW, THEREFORE, under and by virtue of the powers granted by the First War Powers Act, 1941 (P. L. 354, 77th Congress) and by Executive Order No. 9001, dated 27 December 1941, the parties hereto do mutually agree as follows:

ARTICLE 1. ~~Scope of the Supplementary Contract.~~ The contractor shall furnish and deliver the supplies or services described in Schedule A attached hereto for the consideration and upon the terms and conditions in that schedule provided. These supplies or services shall be in addition to all others which the contractor is obligated to furnish the Government.

SCHEDULE A

LOT 2 - SCHEDULE 900-501A

Naval Supply Account Fund, Class 401
Bureau: Ships

Appn.Ult.Chg.: 17X0603, Increase and Replacement of Naval Vessels (C&M) and project orders of the vessels concerned.

Purpose: Additional Equipment for six cylinder 12-1/2 by 13 Adeco type engines being manufactured by Busch.

To be delivered, all transportation charges paid, to the Resident Inspector of Naval Material, c/o Busch-Sulzer Bros. Diesel Engine Company, St. Louis, Missouri, by January 1, 1943.

Item		Number	Unit Price (each)	Total
1.	ADECO individual fuel injection pumps	960	$95.00	$91,200.00
2.	Fuel Injectors, complete	1248	80.00	99,840.00
3.	Special Tools, required: Discharge Valve Pullers	(sets) 32	(per set) 5.00	160.00
4.	Fuel Injector Needles and Guides (Nozzles)	(number) 1152	(each) 25.00	28,800.00
5.	Fuel Pump delivery Valves and Seats	288	10.50	3,024.00
6.	Fuel Pump Plungers and Barrels	576	40.00	23,040.00
			TOTAL	$246,064.00

All shipping packages or containers must be marked with the contract number, preceded by the symbol letters shown, and the item numbers contained therein. When material for more than one contract or order is packed in any single container, all contracts or orders and item numbers contained therein must be shown.

The contractor in performing the work required by this Supplementary Contract shall not discriminate against any worker because of race, creed, color, or national origin. The contractor further agrees that each subcontract made under this contract will contain a similar provision with respect to non-discrimination.

Army and Navy Munitions Board Preference Rating A-1-b, Code No. 5 and End Use Classification USN 2.70, is hereby assigned to this Supplementary Contract and all subcontracts entered into to effect the procurement of materials necessary for the execution of this Supplementary Contract.

All shipping packages or containers must be marked with the contract number, preceded by the symbol letters shown, and the item numbers contained therein. When material for more than one contract or order is packed in any single container, all contracts or orders and item numbers contained therein must be shown.

The contractor in performing the work required by this Supplementary Contract shall not discriminate against any worker because of race, creed, color, or national origin. The contractor further agrees that each subcontract made under this contract will contain a similar provision with respect to non-discrimination.

The Contractor represents and stipulates as follows:

a. The contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract.

b. All persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under the contract; Provided, however, that this stipulation with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor.

c. No person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of 8 hours in any 1 day or in excess of 40 hours in any 1 week, unless such person is paid such applicable overtime rate as has been set by the Secretary of Labor; Provided, however, that the provisions of this stipulation shall not apply to any employer who shall have entered into an agreement with his employees pursuant to the provisions of paragraphs 1 or 2 of subsection (b) of Section 7 of an Act entitled "The Fair Labor Standards Act of 1938": Provided, further, that in the case of such an employer, during the life of the agreement referred to, the applicable overtime rate set by the Secretary of Labor shall be paid for hours in excess of 12 in any 1 day or in excess of 56 in any one week and if such overtime is not paid, the employer shall be required to compensate his employees during that week at the applicable overtime rate set by the Secretary of Labor for hours in excess of 8 in any 1 day or in excess of 40 in any one week.

d. No male person under 16 years of age and no female person under 18 years of age and no convict labor will be employed by the contractor in the manufacture or production or furnishing of any of the materials, supplies, articles or equipment included in the contract.

e. No part of the contract will be performed nor will any of the materials, supplies articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of the contract. Compliance with the safety, sanitary, and factory inspection laws of the state in which the work or part thereof is to be performed shall be prima-facie evidence of compliance with this subsection.

f. Any breach or violation of any of the foregoing representations and stipulations shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of the contract, in the sum of $10.00 per day for each male person under 16 years of age or each female person under 18 years of age, or each convict laborer knowingly employed in the performance of the contract, and a sum equal to the amount of any deductions, rebates, refunds, or under-payment of wages due to any employee engaged in the performance of the contract; and, in addition, the agency of the United States entering into the contract shall have the right to cancel same and to make open-market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor. Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of the contract as set forth herein may be withheld from any amounts due on the contract or may be recovered in a suit brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered: Provided, that no claims by employees for such payments shall be entertained unless made within 1 year from the date of actual notice to the contractor of the withholding or recovery of such sums by the United States of America.

g. The contractor shall post a copy of the stipulations in a prominent and readily accessible place at the site of the contract work and shall keep such employment records as are required in the Regulations under the act available for inspection by authorized representatives of the Secretary of Labor.

h. The foregoing stipulations shall be deemed inoperative if this contract is for a definite amount not in excess of $10,000.00.

1130 P

SECTION Renegotiation Pursuant to Section 403 of the 4th Supplemental National Defense Appropriation Act, 1942, Approved 28 April 1942.

(a) Upon the written request of the Secretary of the Navy, at such period or periods when in the judgment of the Secretary of the Navy the profits accuring to the contractor under this contract can be determined with reasonable certainty, the contract price shall be renegotiated to eliminate therefrom such amount as is found as a result of such renegotiation to represent excessive profits.

(b) There shall be retained by or repaid to the Government (1) the amount of the contract price found as a result of such renegotiation to represent excessive profits to the contractor, and (2) an amount of the contract price equal to the amount of the reduction in the price of any subcontract hereunder pursuant to the renegotiation of such subcontract as provided in paragraph (c) hereof, not otherwise repaid to the Government, to the extent of any amount unpaid under such subcontract by the contractor to the subcontractor.

(c) Any subcontract entered into under this contract for an amount in excess of $100,000 shall contain substantially the following provisions:

(1) Upon the written request of the Secretary of the Navy, at such period or periods when in the judgment of the Secretary of the Navy the profits accruing to the *_____ under this contract can be determined with reasonable certainty, the contract price shall be renegotiated by the Secretary of the Navy and *_____, to eliminate therefrom such amount as is found as a result of such renegotiation to represent excessive profits.

(2) There shall be retained by **_____ or repaid to the Government at the direction of the Secretary of the Navy any amount of the contract price found as a result of such renegotiation to represent excessive profits to *_____.

(3) **_____ is hereby relieved from any liability to *_____ on account of any amount retained or repaid pursuant to paragraph (2).

(d) The term "Secretary of the Navy" for the purposes of this article shall be deemed to include any authorized representative of the Secretary.

(e) The contractor agrees that it will keep records and books of account showing the cost of performing this contract, in accordance with sound accounting practice. The contracting officer and his authorized representatives shall at all reasonable times have access to all records, books of account and original evidences of cost of the contractor pertaining to this contract. The contractor shall preserve all such records, books of account and original evidences of cost for a period of three years after the completion or other termination of this contract and, if it is determined to renegotiate the price herein, for such additional period as may be necessary.

*Indicate Subcontractor
**Indicate Contractor

975-P

ARTICLE 2. Provisions of Original Contract. Except as otherwise provided in Schedule A, all the provisions of the original contract with any amendments thereto, to the extent they are not inconsistent with the terms of this agreement, shall have full force and effect with respect to the supplies or services which constitute the subject of this Supplementary Contract.

IN WITNESS WHEREOF, the parties hereto have executed this contract as of the day and year first above written.

THE UNITED STATES OF AMERICA

By _____

Purchasing Officer,
Bureau of Supplies and Accounts,
Navy Department

Two witnesses:

_____

_____

ADECO

Contractor.

~~B.Ch. Kelleher, Pres~~

4401 N. Ravenswood Chgo.
(Business address)

I, N. V. Simmons, certify that I am the Secretary of the corporation named as contractor herein; that B.Ch. Kelleher who signed this contract on behalf of the contractor, was then Pres of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

_____ Corporate Seal

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer NAVY DEPT BUREAU of Supplies

Part No. _____

1 of 1

Purchase Order No.	Date	Quantity	Date of 1st Deliv	1941	Shipments 1942	1943	1944	1945	TOTAL		SHIPMENTS ON ORDER RECEIVED 1941	1942	1943	TOTAL
NOS-86075 Complete	5-16-41	56	8-18-41	1178.00		64790.00			65968.00				64790.00	64790.00
Special Tools required discharge valve Pullers	5-16-41	16	12-31-41		80.00				80.00	66048.00		80.00		80.00
NOS-86075-Suppl	8-17-42													
Adeco individual Fuel injection pumps	8-17-42	960	10-19-42			47595.00	43605.00		91200.00					
Fuel injectors Complete	8-17-42	1248	10-27-42			17280.00	82560.00		99840.00					
Special Tools, required Discharge valve Pullers	8-17-42	32	12-28-42				160.00		160.00					
Fuel injector needless Guides (Nozzles)	8-17-42	1152	10-31-42			4000.00	24800.00		28800.00					
Fuel Pump delivery valves and seats	8-17-42	288	10-31-42			3024.00			3024.00					
Fuel pump Plungers & Barrels	8-17-42	576	1-25-43				23040.00		23040.00	244064.00				
PH-22	5-15-41	75		431250						431250				
" NW-15913	3-9-42	170	3-15-42		3450.00	6325.00				9775.00		3450.00	6325.00	9775.00
" 18093	7-10-42	185	7-20-42			10637.50				10637.50				
				5490.50	3530.00	153651.50	174165.00			336837.00		3530.00	71115.00	74645.00
						71115.00								
						84536.50								

[fol. 568] IN UNITED STATES DISTRICT COURT

[Title omitted]

[File endorsement omitted.]

AFFIDAVIT OF B. CH. KELLEHER IN RESPECT OF WOODWARD GOVERNOR COMPANY—Filed July 2, 1945

B. Ch. Kelleher, being first duly sworn, on oath deposes and says that he is now and has been since June, 1940 the President and General Manager of Aircraft & Diesel Equipment Corporation; that this affidavit pertains solely to the relations of Aircraft & Diesel Equipment Corporation (herein called "Plaintiff") with Woodward Governor Company (herein called "Woodward"), and is one of a series of affidavits made by this affiant pertaining to the contracts of Plaintiff with purchasers of its equipment; that this affidavit and the exhibits are made in support of the position of Plaintiff that a substantial portion of its sales made in the fiscal years ended November 30, 1942, November 30, 1943 and November 30, 1944 are not subject to renegotiation.

Affiant states that:

[fol. 569] (1) In affiant's opinion, Plaintiff had a contract with Woodward to furnish drive and idler gears necessary to complete its governors for variable pitched propellors required by the manufacturers of the Hamilton propellor, and that such opinion is based upon the following facts:

(2) In the year 1940, prior to the beginning of the Plaintiff's present management, Woodward had severed all business relations with the Plaintiff, because of the poor quality of the Plaintiff's products.

(3) During the month of February, 1941, A. W. McDonald, representing Woodward, came to the office of the Plaintiff and discussed the possibility of Plaintiff doing certain work for Woodward. McDonald pointed out that Plaintiff's performance had theretofore been unsatisfactory to Woodward; that if he placed orders with Plaintiff he expected performance on the date specified, and, to some extent, his personal reputation was involved because he

had been warned of Plaintiff's previous record of non-performance.

(4) Affiant assured McDonald that he would take no orders for any work which could not be performed by Plaintiff in accordance with specifications and on time.

(5) Thereafter business relations between Woodward and Plaintiff were resumed on the basis of the Plaintiff being on trial.

(6) On March 5, 1941 Woodward addressed a letter to Plaintiff in respect of Plaintiff's methods, by which the breaking of corners of gears was obviated. A copy of such letter is attached hereto marked "Exhibit W-1".

[fol. 570] (7) On March 12, 1941 Woodward wrote a letter thanking Plaintiff for its cooperation in respect of buffing and polishing techniques which it had demonstrated to Woodward, a copy of which letter is attached hereto, made a part hereof, and marked "Exhibit W-2".

(8) Thereafter in March, 1941 Woodward, by McDonald advised Plaintiff that it would require idler and drive gears from Plaintiff, beginning in July or August, 1941, with monthly shipments of 1000 of each, increasing to 3000 and 4000 of each per month. Woodward requested Plaintiff to determine with definiteness whether Plaintiff could furnish these parts in quantities requisite to meet such requirements. This affiant, for Plaintiff, agreed to meet the requirements of Woodward in respect of such gears, known to the parties as drive gear No. 53940, later changed to No. 54695, and idler gear No. 50659, later changed to No. 53896. It was agreed by McDonald on behalf of Woodward and by this affiant on behalf of Plaintiff that Plaintiff should be the supplier of Woodward for such gears and such other parts as Woodward might from time to time require and which Plaintiff could make.

(9) On May 9, 1941 Woodward sent Plaintiff a letter enclosing prints, route sheets and process drawings relating to parts Nos. 53940 and 50699, and indicating that Plaintiff was to make these gears. A copy of this letter is attached hereto marked "Exhibit W-3". After much planning, engineering and processing studies, on May 23, 1941 prices were determined in accordance with "Exhibit W-4" attached hereto. On the same day a letter of transmittal of Exhibit W-4, which is marked "Exhibit W-5", was sent

by Woodward to Plaintiff, which letter indicated that Plaintiff would be expected to furnish such gears in in-
[fol. 571] creasing amounts. From then on Plaintiff during all the years 1941, 1942, 1943 and 1944 furnished Woodward such gears, Nos. 53940 and 50659, and modifications thereof, which were given Nos. 54695 and 53896, in accordance with the agreement.

(10) On December 8, 1941 Woodward addressed a letter to Plaintiff, a copy of which is attached hereto and made a part hereof, marked "Exhibit W-6". In this letter Woodward agreed to absorb the cost of tooling.

(11) On December 19, 1941 Woodward wrote Plaintiff stating that Hamilton Standard Propellors had been requested by the War Department to secure from sub-contractors information in respect of their ability to go on a twenty-four hour day, seven day week basis. A copy of this letter is attached hereto and made a part hereof, marked "Exhibit W-7". Affiant told Woodward that Plaintiff could do it when required.

(12) During all the years 1941, 1942 and 1943 Plaintiff made gears for Woodward as rapidly as it could, without regard to any specific orders therefor, with the understanding between Woodward and Plaintiff that so-called purchase orders were actually shipping instructions; that during many periods Plaintiff had in the process of manufacture gears far beyond the actual so-called purchase orders which had been sent by Woodward to Plaintiff. This procedure continued during all such years, limited only by the War Production Board's Controlled Materials Plan, to which Plaintiff adhered after its promulgation.

(13) Affiant says that both Plaintiff and Woodward understood and agreed that so long as Woodward continued
[fol. 572] to supply Hamilton Standard Propellors with governors, Plaintiff was to supply Woodward with its idler and drive gear requirements; that both Woodward and Plaintiff understood and acted upon such agreement, and each considered such agreement binding upon the other. To the end that this agreement might be performed rigorously, Woodward loaned machinery and machine tools to Plaintiff and furnished materials, tools and information in respect of methods, and Plaintiff provided Woodward with such information, methods and processes as might be helpful to Woodward, arranged its shop, hired

skilled workers, technicians, keymen and ordinary workmen to carry out its agreement to keep Woodward supplied to the extent of 2000 to 4000 of each of the units per month, as Woodward might require.

(14) Affiant further says that so far as he remembers, Woodward never requested Plaintiff to sign any separate agreement in respect of so-called renegotiation.

Further affiant saith not.

B. Ch. Kelleher.

Subscribed and sworn to before me this 29th day of June, 1945.

Clyde F. Dewitt, Notary Public.

ESTABLISHED 1870
INCORPORATED 1902

ADDRESS ALL COMMUNICATIONS TO THE COMPANY

TELEPHONE
MAIN 1457

3-6

W-1

WOODWARD

WOODWARD GOVERNOR COMPANY

MANUFACTURERS OF

HYDRAULIC GOVERNORS FOR PRIME MOVERS

ROCKFORD, ILLINOIS March 5, 1941

EASTERN OFFICE
501 FAIRWAY ROAD
RIDGEWOOD, N. J.
TELEPHONE RIDGEWOOD 6-2838

SUBJECT

Aircraft & Diesel Equipment Corporation
4401 N. Ravenswood Avenue
Chicago, Illinois

Attention Mr. H. E. Davis

Gentlemen:

Your letter of February 21 addressed to Mr. McDonald was referred to me, as I have been seeking information in regard to the breaking of corners on gears by the use of buffing or polishing equipment. Mr. McDonald advises that your company is doing an exceptionally good job and suggests that it would be well for us to investigate your methods. He informed me that you had kindly consented to our sending a couple of men to your plant to observe and study the equipment you use and the methods employed on various gears.

We are happy to take advantage of this opportunity and wish to advise you that our Mr. Reskis and Mr. Legge will arrive in Chicago sometime Friday morning to spend the day with you in an effort to learn all that they can that may be of assistance to us in a very difficult problem in gear finishing.

May we thank you in advance for your assistance and cooperation for permitting us this opportunity to overcome our difficulties through your methods.

ED-1870
TED 1902

ADDRESS ALL COMMUNICATIONS TO THE COMPANY

TELEPHONE
MAIN 145

WOODWARD

WOODWARD GOVERNOR COMPANY

MANUFACTURERS OF

HYDRAULIC GOVERNORS FOR PRIME MOVERS

ROCKFORD, ILLINOIS

EASTERN OFFICE
61 FAIRWAY ROAD
RIDGEWOOD, N. J.
TELEPHONE RIDGEWOOD 6 2038

March 12, 1941.

SUBJECT Buffing Operation on Drive Gears.

Aircraft and Diesel Equipment Corporation
4401 North Ravenswood Avenue
Chicago, Illinois

Attention: Mr. H. E. Davis.

Gentlemen:

I am taking this opportunity to thank you kindly for your splendid cooperation in our recent buffing operation on drive gears. Our customer has OK'd the samples and it looks as though we are going to have a better product with less working hours.

Hoping to be of some assistance to you in the future, I remain,

Yours very truly,

WOODWARD GOVERNOR COMPANY

P p: A. W. McDonald

AWMcDonald:ms

ESTABLISHED 1870
INCORPORATED 1902

ADDRESS ALL COMMUNICATIONS TO THE COMPANY

W-2

TELEP
MAIN

WOODWARD

WOODWARD GOVERNOR COMPANY

MANUFACTURERS OF

HYDRAULIC GOVERNORS FOR PRIME MOVERS

ROCKFORD, ILLINOIS May 9, 1941.

EASTERN OFFICE
501 FAIRWAY ROAD
RIDGEWOOD, N. J.
TELEPHONE RIDGEWOOD 6-2830

SUBJECT Prints of Drive Gear 53940 and Idler Gear 50659.

Diesel Equipment Corporation
4401 North Ravenswood Avenue
Chicago, Illinois

Attention: Mr. B. C. Kelleher.

Gentlemen:

Enclosed you will find prints, route sheets, and process drawings of drive gear 53940 and idler gear 50659. Our representative, Mr. McDonald, has requested that we forward these to you. In checking over the route sheets, we find that in the column for "Hours allowed per piece", we have instead given the number of pieces per hour which should be produced. If you are going to use these route sheets to plan the time required for production, you will undoubtedly wish to figure the time per piece and substitute it in place of the figures we have shown. If you have any questions concerning the print specifications, route sheets, or process drawings, please let us know and we will do everything we can to enable you to start production on these items.

Under seperate cover we are sending you one sample each of a drive gear 53940 and an idler gear 50659.

Yours very truly,

WOODWARD GOVERNOR COMPANY

Per: H. M. Greenman

HMGreenman:ms
Enc.

MANUFACTURERS OF
HYDRAULIC GOVERNORS
FOR PRIME MOVERS
PHONE MAIN 1457

WOODWARD GOVERNOR COMPANY

Rockford, Ill.

PURCH ORDER

E.1 W-4

Cards 5-2
Fed Ins 5-27

PUT THIS NUMBER ON ALL INVOICES AND PACKAGES. INVOICE IN DUPLICATE.

CC: Hillsher 5/26/41
Davis
Jerry
Mulberry

. Aircraft and Diesel Equip. Corp.
. 4401 North Ravenswood
. Chicago, Illinois

Date May 23, 1941

Via

Req. No. 2519
Dept. No. 10..
Acct. No.

	QUANTITY	DESCRIPTION	PRICE	AMOUNT
	3,000	HSP 50659 Idler Gear- Job 4702 - Sho 8193	$4.65ea.	-
	3,000	HSP 53940 Drive Gear- Job 4703 - Sho 8194	11.00ea.	plus tooling
		We are to furnish forgings.		
		REJohnson:mj		
		Priority Rating A-1-C		
		Ennessy has letter		

NOTICE—Kindly acknowledge receipt of this order by above number and advise when you will ship. Our number of this order must appear on your invoice and packages.

WOODWARD GOVERNOR COMPANY

By R E Johnson

"Exhibit W-4"

ESTABLISHED 1870
INCORPORATED 1902

ADDRESS ALL COMMUNICATIONS TO THE COMPANY

TELEPHONE
MAIN 1487

W-5

WOODWARD

WOODWARD GOVERNOR COMPANY

MANUFACTURERS OF

HYDRAULIC GOVERNORS FOR PRIME MOVERS

ROCKFORD, ILLINOIS

EASTERN OFFICE
561 FAIRWAY ROAD
RIDGEWOOD, N. J.
TELEPHONE RIDGEWOOD 6-2838

SUBJECT

Copies
Lasley 5/26/41
Heller
Murray
Davis
Jerry
Lewis
Dss

May 23, 1941

Aircraft and Diesel Equip. Corp.
4401 North Ravenswood
Chicago, Illinois

Gentlemen:

We are enclosing our purchase order E 1 for 3,000 each of our Idler Gear and Drive Gear in accordance with the understanding reached with our Mr. McDonald. This is a preliminary order, and there will be substantially increased orders for these parts when our new program gets fully under way.

We have a substantial stock of forgings on hand and will be in a position to furnish any quantity you require upon short notice.

It is our understanding that you have a complete set of prints and route sheets. However, should there be any other information along this line that you require, please let us know by return mail. We would be pleased to have you come out to our shop and make a survey of our method of producing these parts if this would be of any help to you.

Yours very truly,

WOODWARD GOVERNOR COMPANY

R. E. Johnson

REJohnson:mj

ISHED 1870
RATED 1902

ADDRESS ALL COMMUNICATIONS TO THE COMPANY

TELEPH
MAIN

WOODWARD

WOODWARD GOVERNOR COMPANY

MANUFACTURERS OF

HYDRAULIC GOVERNORS FOR PRIME MOVERS

ROCKFORD, ILLINOIS

EASTERN OFFICE
561 FAIRWAY ROAD
RIDGEWOOD, N. J.
TELEPHONE RIDGEWOOD 6-2838

SUBJECT Please mark reply for attention of writer.

December 8, 1941

Aircraft & Diesel Equipment Corp.
4401 North Ravenswood Avenue
Chicago, Illinois

Gentlemen:

In passing your invoices for the tooling up for production of our Drive and Idler Gears the accounting department raised the question as to where the title to these tools and fixtures would rest.

You will recall that it was our original intention that the duplication of jigs and fixtures was to be paid for and title was to rest in some agency of the U.S. Government.

Because of the red tape involved, it has been decided that Woodward Governor would absorb the cost of this tooling. Will you, therefore, mark your records to show that title will rest in Woodward Governor Company.

Very truly yours,

WOODWARD GOVERNOR COMPANY

Per. R E Johnson

REJohnson:mj

DEC 10 40

J-7

BLISHED 1870
PORATED 1902

ADDRESS ALL COMMUNICATIONS TO THE COMPANY

TELEPHON
MAIN

WOODWARD

WOODWARD GOVERNOR COMPANY

MANUFACTURERS OF

HYDRAULIC GOVERNORS FOR PRIME MOVERS

ROCKFORD, ILLINOIS

EASTERN OFFICE
561 FAIRWAY ROAD
RIDGEWOOD, N. J.
TELEPHONE RIDGEWOOD 6-2038

SUBJECT Please mark reply for attention of writer.

December 19, 1941

Aircraft & Diesel Equipment Corp.
4401 North Ravenswood Avenue
Chicago, Illinois

Gentlemen:

There has been reffered to us by Hamilton Standard Propellers a request from the War Department that we secure the following information from our sub-contractors.

> The number of man hours per week, and the number of shifts per day you are now operating on our work; and the length of time it will take to step your employement up to 24 hours a day seven days a week should this eventuallity become necessary.

We would like too an estimate of the increase in cost which you would incur, should it be necessary to go on a 24 hour a day seven day basis.

We would appreciate your letting us have this information as early as possible, so that we might have this information available for the War Department.

Very truly yours,

WOODWARD GOVERNOR COMPANY

Per. R E Johnson

REJohnson:mj

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

WOODWARD

PART No	DESCRIPTION	SHIPMENTS 1941	12-[illegible] to 4-28-42	4-29-42 to 11-30-44	1943	1944	TOTAL	SHIPMENTS ON ORDERS Received Prior to April 28, 1944 1941	12-[illegible] to 4-28-42	4-29-42 to 11-30-44	1943	TOTAL
50659-D	Idler Gear	$33972.90	$24328.80	$163738.80	21696.80		$243734.30	$33972.90	$24328.80	$57353.10		$115654.80
53940	Drive Gear	51634.00	59400.00	301796.00	62920.00		475750.00	51634.00	59400	75966.00		187000.00
54695	Drive Gear				215428.50	19831.50	435260.00					
53896	Idler Gear				137196	111894.00	449090.00					
58408					62817.00	7632.00	70449.00					
57489			760.80		1034.94		1795.74		760.80			760.80
		$85606.90	$84489.60	$465531.80	501093.24	139357.50	1276079.04	$85606.90	$84489.60	$133319.10		$303415.60
				133319.10								
				334414.70								

Part No 50659-D and 53896 is an idler gear, part 53896 is practically the same as part 50659-D as there was a slight engineering change.

Part No 53940 and 54695 is a drive gear, part 54695 is practically the same as part 53940 as there was a slight engineering change.

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer WOODWARD

Part No. 50659-D

IDLER GEAR.

Purchase Order No.	Date	Quantity	Date of 1st daily	Shipments 1941	12-1-41 to 4-28-42	4-29-42 to 11-30-42	1943	1944	Overrun
E-1	5-23-41	3000	7-23-41	1553565					341
DE 3✓	9-3-41	3000	10-8-41	18437 25	465				966
E 51	11-27-41	5000	12-10-41		4434415	9800			251
E 6✓	2-12-42	6000	3-19-42			27900			
F 137	7-15-42	20000	8-7-42			66276 45	2169680		
D5806	3-26-42	6000	4-27-42			29360 10			
D 7366	5-1-42	9000	6-20-42			40106 25			
				3397290	4434880	16373580	2169680		

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer Woodward

Part No. 53940

Drive Gear

3 of 7

| | | |

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer Woodward

Part No. 54695

Purchase Order No.	Date	Quantity	Date of 1st daly	Shipments 1941	12-1-41 to 4-30-42	5-1-42 to 11-30-42	1943	1944
2365	9-17-42	500	2-18-43				4750	
8401	2-10-43	4000	2-26-43				17750	
10999	4-26-43	3000	7-19-43				20500.00	
9619	3-16-43	1000	6-17-43				13500.00	
13158	6-23-43	2000	10-19-43				19750.00	
11907	5-21-43	3000	7-13-43				28500.00	
14288	7-16-43	3000	11-16-43				28500.00	
15348	8-26-43	3000	12-17-43				20668.50	19831.50
17300	10-18-43	3000	12-31-43					
17306	10-18-43	3000	1-19-44					
							154850	19831.50

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer Woodward

Part No. 53896

IDLER GEAR

Purchase Order No.	Date	Quantity	Date of 1st Delv	1941	Shipments 1942	Shipments 1943	1943	1944
2076	9-2-42	500	12-1-43				3000	
8402	2-10-43	4000	3-4-43				24030	
9680	3-16-43	1000	6-17-43				6000	
10998	4-24-43	3000	6-25-43				18000	
11982	5-22-43	3000	7-30-43				18000	
13706	6-21-43	3000	8-24-43				18000	
13814	7-10-43	3000	9-13-43				18060	
14201	7-21-43	3000	10-7-43				18000	
17295	10-18-43	3000	11-18-43				14106	3894
17296	10-18-43	3000	12-13-43					18000
17297	10-18-43	3000	2-28-44					18000
17298	10-18-43	3000	3-4-44					18000
17299	10-18-44	3000	3-24-44					18000
25116	4-3-44	3000	4-21-44					18000
25117	4-4-44	3000	4-14-44					18000
							137196	111894

Customer Woodward

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Part No. 58408

6 of 7

Purchase Order No.	Date	Quantity	Date of 1st Sale	Shipments 1942	1943	1944	1945	1946
4671	11-22-42	1000	1-25-43				225000	
5804	12-8-42	2000	12-16-43				330000	
8207	2-5-43	3000	2-28-43				852750	
F 9681	3-16-43	8400	4-30-43				2021175	
F 11750	5-17-43	8400	8-3-43				1998900	
F 12813	6-15-43	8400	8-31-43				778725	763200
F 18982	12-2-43	16500	2-18-44					
							6281700	7632

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

[redacted] Woodward

Part No. 57489

7 of 7

Mill spline on coupling

[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
D-2051	11-25-41	46	12-1-41		12240			
E 2268	12-3-41	67	12-15-41		13200			
D 3978 4524	1-24-42	97	1-31-42		50640			
17063	10-13-43	1016	10-28-43				386.08	
12352	6-3-43	2000	6-5-43				412.48	
12974	9-15-43	875	7-21-43				236.36	
					76080		1034.92	

[fol. 587] IN UNITED STATES DISTRICT COURT

[Title omitted]

[File endorsement omitted.]

AFFIDAVIT OF B. CH. KELLEHER IN RESPECT OF HUDSON MOTOR COMPANY AND ITS SUCCESSOR WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY, STUDEBAKER CORPORATION (AVIATION DIVISION) AND GENERAL MOTORS CORPORATION (PACKARD ELECTRIC DIVISION)—Filed July [redacted], 1945

B. Ch. Kelleher, being first duly sworn, on oath deposes and says that he is now and has been since June, 1940 the President and General Manager of Aircraft & Diesel Equipment Corporation; that this affidavit pertains to the relations of Aircraft & Diesel Equipment Corporation (herein called "Plaintiff") with Hudson Motor Car Company and its successor from and after October 27, 1943, Westinghouse Electric & Manufacturing Company, and Studebaker Corporation, Aviation Division, and Packard Electric Division of General Motors Corporation; that this [fol. 588] affidavit is one of a series of affidavits made by this affiant pertaining to the contracts of Aircraft & Diesel Equipment Corporation with purchasers of its equipment; that this affidavit and the schedule attached are made in support of the position of Plaintiff that a substantial portion of its sales made in the fiscal years ending November 30, 1942 and November 30, 1943, are not subject to renegotiation.

Affiant states that:

(1) The sales made to the above named Hudson Motor Car Company and its successor Westinghouse Electric & Manufacturing Company, the Studebaker Corporation (Aviation Division) and General Motors Corporation (Packard Electric Division) aggregate not to exceed the sum of $406,684.75 in the fiscal year of Plaintiff ended November 30, 1943.

(2) Time has not permitted this affiant to search the files of the Plaintiff to secure letters and documents supporting the existence of a contract, as has been done with other divisions of General Motors Corporation and Fairchild Aviation and Airplane Company (Ranger).

(3) In general, the sales made to Hudson Motor Car Company and its successor, Westinghouse Electric & Man-

ufacturing Company, Packard Electric Division of General Motors Corporation, and Studebaker Corporation, Aviation Division, followed the same general plan as that of other divisions of General Motors Corporation; namely, that Aircraft & Diesel Equipment Corporation was advised from time to time as to increased schedules of said companies, and upon receipt of such information arranged its machinery, personnel and facilities in such a way as to meet said increasing schedules, and so advised said purchasers.

[fol. 589] (4) The computations attached hereto and made under the supervision of this affiant by auditors furnished by Lybrand, Ross Bros. & Montgomery, Certified Public Accountants, from the books of original entry kept and maintained by Plaintiff in the ordinary course of its business, are believed by affiant to be correct. (Such computations are attached hereto and marked "Exhibit—General 1", "Exhibit—General 2" and "Exhibit—General 3").

(5) In affiant's opinion Plaintiff had a contract with each of the above named corporations for the purchase of aircraft parts prior to April 28, 1942, and at all times thereafter, and that said contracts were not subject to renegotiation by reason of any subsequently enacted statute.

(6) In affiant's opinion each of said above named corporations relied upon Plaintiff to supply the parts then being made by Plaintiff for each of the said corporations in the amounts necessary to meet the increased requirements of said corporations, and all as a part of contracts with said corporations which said contracts were all made prior to April 28, 1942, and that if afforded an opportunity, supporting letters, telegrams and documents could be exhibited establishing the existence of such contracts.

(7) This affiant believes that the sales made to Hudson Motor Car Company and its successor Westinghouse Electric & Manufacturing Company, the Studebaker Corporation, and Packard Electric Division of General Motors Corporation were all sales not subject to renegotiation, such sales having been made upon a contract or contracts with said purchasers prior to April 28, 1942; and that, in addition, affiant was informed and believed that the provisions for renegotiation appearing in the Sixth Supple-

[fol. 590] mental National Defense Appropriation Act of

1942 were and are unconstitutional and void, and no renegotiation could be had under or pursuant to the provisions of said act.

(8) In any event, said sales made during the year 1943 were not subject to renegotiation under the terms and provisions of the Renegotiation Act adopted February 24, 1944.

Further affiant saith not.

B. Ch. Kelleher.

Subscribed and sworn to before me this 29th day of June, 1945.

Clyde F. Dewitt, Notary Public.

Hudson Motor Car Co

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

1/20

Part No.	Number First Order	Description	SHIPMENTS 1941	12-7-41 to 4-28-42	4-29-42 to 11-30-42	Nov 30 1943	Nov 30 1944	May 31 1945	Total	SHIPMENTS ON ORDERS RECEIVED Prior To April 28 1942: 1941	1942	1943	Total	After April 28 1942
1063	60329 P	Axis	382 11	675 86	4154 80	5501 49			10714 26	382 11	675 86	2023 35	3081 32	7632 94
1065	52570-7 N	Plunger	34 92	2201 85	2905 20	9742 08			14884 05	34 92	2201 85	1785 60	4022 37	10861 68
1069	52570-7 N	Plunger	791 55	1514 39	2675 45	3765 80			8747 19	791 55	1514 39	784 75	3090 69	5656 50
1070	60332 P	Plunger	941 40	-	2465 20	6088 80			9495 40	941 40	-	840 00	1781 40	7714 00
1071	60335 P	Plunger	1008 46	831 48	3717 48	11248 99			16806 41	1008 46	831 48	1767 48	3607 42	13198 99
1075	60333 P	Magazine Interlock Rod	5 88	2565 15	7698 47	9498 98			19768 48	5 88	2565 15	2075 97	4647 00	15121 48
1080	60334 P	Stop	264 48	289 13	3468 40	7445 59			11467 60	264 48	289 13	751 89	1305 00	10162 60
1207	64489 P	Axis Bolt	-	-	11799 48	-			11799 48		-	560 00	560 00	11239 48
1209	60337 P	Axis Bolt	50 76	195 48	2640 49	1439 17			4325 90	50 76	195 48	385 76	632 00	3693 90
1210	60338 P	Axis Bolt	129 36	334 78	-	904 72			1368 86	129 36	334 78	-	464 14	904 72
1212	63297 P	Parallelogram Lever Plunger Rear	-	-	13152 05	10279 50			23432 55			5670 00	5670 00	17762 55
1213	60339 P	Plunger	200 64	122 40	5273 94	12106 81			17703 79	200 64	122 40	2015 04	2338 08	15365 71
1214	60340 P	Axis Bolt	135 20	743 40	830 80	1308 96			3018 36	135 20	743 40	30 80	909 40	2108 96
1217	60341 P	Bolt	273 24	306 72	1811 97	212 76			2604 69	273 24	306 72	634 50	1214 46	1390 23
1224	60342 P	Axis Bolt	67 20	189 70	1023 40	455 45			1735 75	67 20	189 70	317 10	574 00	1161 75
1225	63297 P	Trigger Pawl	-	-	16285 50	5122 70			21408 20	-	-	7623 00	7623 00	13785 20
1226	60343 P	Spring Case	4 35	1767 84	22943 58	33595 17			58310 94	4 35	1767 84	3481 83	5254 02	53056 92
1319	60344 P	Axis Bolt	220 43	547 55	3683 63	5445 19			9896 80	220 43	547 55	219 02	987 00	8909 80
1323	60345 P	Securing Nut	589 50	8467 20	40306 50	68814 03			118177 23	589 50	8467 20	26655 30	35712 00	82465 23
			5099 48	20752 93	146837 34	192976 19			365665 94	5099 48	20752 93	57620 89	83473 30	282192 64

57620 89
89216 45

146837 34
20752 93
167590 27

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer Hudson

Part No. OE 1063

Axis

Purchase Order No.	Date	Quantity	Date of 1st dely	Shipments 1941	12-1-41 to 4-28-42	4-29-42 to 11-30-42	1943	1944	Overrun Cancelled		Location of Cond
60329-P	10-25-41	2100	11-1-41	38211	67586				151		
64453-P	4-17-42	2100	6-17-42			103635			105		Misc
64489-P	4-28-42	2000	8-26-42			98700			100		Misc
73511-P	10-26-42	4320	12-29-42				221699		387		Misc
78581-P	3-10-43	4528	3-20-43				172258	3338	31	863	
80888-P	5-20-43	3000	9-29-43				135000				Misc
66590-P	[illegible]-3-42	4500	7-8-42			213145			35		Misc
10176							21195				
				38211	67586	415480	550149				

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer Hudson

Part No. D E 1065

Plunger

Purchase Order No.	Date	Quantity	Date of 1st Daily	Shipments 1941	12-7-41 to 4-30-42	4-30-42 to 12-30-42	1943	1944	Overrun Cancelled	Location of Card
64453-P	4-17-42	2100	4-24-42		116640	34560				Misc
64489-P	4-28-42	2000	6-20-42			144000				Misc
73511-P	10-26-42	3500	2-22-43				252000			Misc
80888-P	5-20-43	2492	9-30-43				150816		403	Misc
52570H-52577W	11-13-41	25	11-24-41	2087						Misc
60330-P	10-25-41	2100	11-12-41	405	103545				210	
65697-P	5-19-42	5000	6-20-42			111960	240408			Misc
76386-P	1-20-43	3500	2-25-43				249840			Misc
80849-P	4-16-43	1334	4-29-43				81844			Misc
10177-P	11-22-43	4221	12-20-43					253260		
				3492	220185	290520	974408			

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer Hudson

Part No. OE 1069

40-70

Plunger

Purchase Order No.	Date	Quantity	Date of 1st Daily	Shipments 1941	1942	1943	1944	Over Run Cancelled	Location of Card
64489-P	4-28-42	2000	6-20-43			75482		68	Misc
52570-7N	11-13-41	4	11-24-41	3636					Misc
60331-P	11-25-41	2100	11-22-41	75519	1132				
61636-P	7-28-42	4200	3-24-42		150307	2993			
66590-P	7-3-42	5910	8-31-42			189070	26645		Misc
73515-P	10-26-42	4000	12-18-43				153382	257	Misc
76375-P	1-15-43	4000	3-26-43				134138	325	
80888-P	5-20-43	3000	6-9-43				61831	47487	Misc
11534							584		
				79155	151439	267545	396580		

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer Hudson

Part No. 05/1070 5470

Plunge

Purchase Order No.	Date	Quantity	Date of 1st Daily	1941	Shipments 12-1-41 4-30-42	6-27-42 11-30-42	1943	1944	Overrun Cancelled		Location of Card
52570-7 N	11-13-41	4	11-24-41	4540							Misc
73511 P	10-26-42	5000	12-22-42				199800				Misc
80888-P	5-20-43	3000	6-9-43				118080		8		Misc
60332-P	10-24-41	2100	11-6-41	89600					140		
64489-P	4-28-42	2000	7-23-42			84000			100		Misc
66590-P	7-3-42	5000	7-29-42			162520	37280				Misc
78544-P	2-22-43	6356	3-20-43				253720			28	Misc
10184-P	11-24-43	5140	2-17-44					205600			
				94140		246520	608880				

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer Hudson

Part No. OE 1071

Plunger

Purchase Order No.	Date	Quantity	Date of 1st Daily	Shipments 1941	1942	1943	1944	Overrun Cancelled Balance	Location of Card
52570-7 N	11-13-41	4	11-24-41	4427					Misc
80849-P	4-16-43	5000	6-29-43			77400	47875		Misc
64489-P	4-28-42	4000	5-30-42		176748			532	Misc
66590-P	7-3-42	5000	7-30-42		195000				Misc
78544-P	2-22-43	8000	3-20-43			312000			Misc
60335-P	10-27-41	4200	11-1-41	96369	83148			403	
69420-P	10-27-42	3500	12-17-42			126500			
73511-P	10-26-42	5000	12-17-42			195000			Misc
78570-P	3-5-43	10000	4-30-43			388674			
80888-P	5-20-43	5502	10-26-43			15525	130675		Misc
10185	11-24-43	5000	3-27-44				125000		
				100846	83148	3717 48	1144899		

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer Hudson

Magazine Interlock Rod
Location of Gear

| | | |

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer Hudson

Part No. QE 1080

Stop

Purchase Order No.	Date	Quantity	Date of 1st Ady	Shipments 1941	[illegible]	[illegible]	1943	1944	Overrun Cancelled		Location of Card
60334-P	10-27-41	2100	11-22-41	26448	28913	11339			200		
64489-P	4-28-42	2000	5-4-42			63800			200		Misc
65697-P	5-19-42	5000	5-21-42			152250			250		Misc
69434	8-21-42	2985	9-28-42			90915			150		
73511-P	10-26-42	5000	12-30-42				145029				Misc
73530-P	11-2-42	10530	11-20-42			28532	277936		38		
80821-P	3-29-43	11936	4-30-43				321594	143910			
80888-P	5-20-43	3900	1-10-44					152100			Misc
10186-P	11-26-43	10233	2-28-44					392964		157	
				26448	28913	346840	744559				

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer Hudson

Part No. QE 1207

9/20

Axis Bolt

Purchase Order No.	Date	Quantity	Date of 1st daly	Shipments 1941	12-1-41 to 4-28-42	4-29-42 to 11-30-42	1943	1944	Increase	Overrun	Location of Card
64489-P	4-28-42	2000	5-11-42			56000					Misc
66590-P	7-3-42	36430	8-22-42			11739.48			3711		
						11799.48					

Customer Hudson

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Part No. OE 1409 10/40

Axis Bolt

Purchase Order No.	Date	Quantity	Date of 1st Ddy	Shipments 1941	[illegible]	[illegible]	1943	1944		Overrun Cancelled	Location of Card
80849-P	4-16-43	6000	8-20-43				40380				
64489-P	4-28-42	2000	5-11-42			38000					Misc
65697-P	5-19-42	5000	5-21-42			113240					Misc
73511-P	10-26-42	2770	11-30-42			6232	47557			960	Misc
50888-P	5-20-43	4499	10-30-43				27480	17510		91	Misc
60337-P	11-1-41	2100	11-1-41	5076	19548	576					Misc
66574-P	Appx 7-1-42	5000	7-28-42			106001					
78547-P	2-26-43	1500	8-30-43				28500			579	
10187-P	11-24-43	3000	12-31-43					30000			Misc
				5076	19548	164049	143917				

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer Hudson

Part No. QE 1210

Axis Bolt

Purchase Order No.	Date	Quantity	Date of 1st deliv	Shipments 1941	1942	1943	1944	Over Run	Cancelled	Location of Card
55570H-55577H	11-13-41	25	11-24-41	3360						Misc
60338-P	10-27-41	2400	10-31-41	9576	33478			166		
73511-P	10-26-42	3500	12-27-42			66472				Misc
80849-P	4-16-43	2000	4-30-43			24000				Misc
				14936	33478	90472				

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer Hudson

Part No. QE 1212

12 & 20

Parallelogram Lever Plunger Rear

Purchase Order No.	Date	Quantity	Date of 1st Ship	Shipments 1942	Shipments [illegible]	Shipments [illegible]	1943	1944	Overrun	Location of Card
78547-P	2-26-43	1500	4-30-43				202500			Misc
73511-P	10-26-42	3000	11-20-43			39555	385155		146	Misc
80849-P	4-16-43	3000	4-30-43			"	225290			Misc
63297-P	3-31-42	4200	5-11-42			567000				
80888-P	5-20-43	3000	9-15-43				215025	21450	286	Misc
10189-P	11-26-43	4786	1-10-44					361569		
65697	5-21-42	5000	5-29-42			708750			250	Misc
						1315305	1047950			

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer Hudson

Part No. OE 1210

13/20

Plunger

Purchase Order No.	Purchase Order Date	Quantity	Date of 1st delv	Shipments 1941	1942	1943	1944	Overrun	Location of Card
50888-P	5-20-43	5319	7-17-43			2443 80			Misc
60339-P	10-27-41	4200	11-12-41	200 64	122 40	201 50		571	
65697-P	5-19-42	5000	5-21-42			283 50		250	
73511-P	10-26-42	6640	11-20-42			423 90	3161 70		Misc
76320-P	12-11-42	6000	2-12-43				3240 00		Misc
80849-P	4-16-43	5000	5-24-43				2240 41		Misc
85532-P	10-11-43	5000	11-8-43				1061 10	1188 90	
				200 64	122 40	5173 94	11106 81		

[illegible] & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer Hudson

Part No. QE 1714

14 & 70

Axis Bolt

[illegible] No.	[illegible] Date	Quantity	Date of 1st [illegible]	Shipments 2nd	[illegible]	[illegible]	3rd	4th	Over Run Cancelled		Location of Card
64453-P	4-17-42	2100	4-24-42		417 40	30 80			141		
73511-P	10-26-42	3270	1-22-43				687 00		165		Misc
60340-P	10-27-41	2100	11-5-41	135 20	326 00				206		Misc
66590-P	7-3-42	4000	8-31-42			800 00					
78547-P	2-26-43	1500	4-14-43				358 44				Misc
80888-P	5-20-43	2485	9-7-43				262 56			797	Misc
				135 20	743 40	830 80	1308 96				Misc

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

15 of 20

[illegible] Hudson

[illegible] OE 1217

Bolt

[illegible] No.	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]			OVERRUN	Cancelled					Location of Card
66590-P	7-3-42	4000	8-21-42			117747	4590				378						Misc
78547-P	2-26-43	1500	4-26-43				20819					778					Misc
60341-P	10-27-41	2100	11-10-41	273 24	30672						44						
64489-P	4-28-42	2000	5-25-42			63450					350						Misc
11385-P	2-9-44	224	3-2-44					11010									
				273 24	30672	1311 97	41796										

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

16 of 20

Customer Hudson

Part No. OE 1224

Axis Bolt

Purchase Order No.	Date	Quantity	Date of 1st delivery	Shipments 1941	[illegible]	[illegible]	1943	1944				OVERRUN				Location of Card
76370-P	12-11-42	2000	4-7-43					28028				39				Misc
80888-P	5-20-43	3000	10-23-43					24000								Misc
64489-P	4-28-42	2000	5-12-42				28000									Misc
60342-P	10-28-41	2100	10-31-41	6720	18970		3710									
66590-P	7-3-42	4475	7-18-42				65800	476				225				Misc
73511-P	10-26-42	3474	11-20-42				44330	Cr. (69590)								Misc
				6720	18970		104340	85545								

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Order No. Hudson — Dept. No. OE 1XXV — 17979

Triggs a Pawl

No.										Location of Order
P0149-P	4-16-42	750	10-5-42				19070			Misc
63797-P	3-24-42	4000	5-16-42			74300		440		
78505-P	2-7-42	1000	2-27-42				19497		24	Misc
P0008-P	5-20-42	1000	5-20-42				19379		176	Misc
65697-P	5-21-42	1000	5-21-42			11650		282		Misc
N834							15500			
						164850	114470			

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

18/20

Customer Hudson

Part No. OE 1226

Spring Case

[illegible] No.	Date	Quantity	Date of 1st Ship	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]		Overrun Cancelled	Location of Card
83138-P	6-17-43	5000	10-30-43				221500	403500			Misc
66590-P	7-3-42	5000	8-31-42			865920				248	Misc
73511-P	10-26-42	5000	12-17-42				741510	11550		70	Misc
78505-P	2-2-43	10000	3-17-43				1680262				Misc
80888-P	5-20-43	4274	9-8-43				534250		V		Misc
60343-P	10-28-41	2100	10-31-41	435	176784	18183				146	
64487-P	4-28-42	2000	5-5-42			330000					
64496-P	5-5-42	4200	6-9-42			693000					
69473-P	9-25-42	3450	11-20-42			387255	181995				
				435	176784	2494358	3359517				

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer Hudson

Part No. OE 1319

Axis Bolt

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[illegible] No.	[illegible]	Quantity	Date of 1st Acty	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]		OVERRUN		Location of Card
64489-P	5-2-42	2000	5-29-42			106000						Misc
78505-P	2-2-43	5000	4-2-43				265000					Misc
60344-P	10-28-41	2100	10-31-41	220 43	547 55	219 04						
66590-P	7-3-42	4000	8-29-42			222653				201		
73511-P	10-26-42	5000	11-20-42			17808	247194					
80851-P	4-19-43	3000	9-6-43				328400	79360		1		
80888-P	5-20-43	2428	2-17-44					92126				Misc
11363	1-20-44	2000	2-19-44					80000				
				220 43	547 55	368363	544514					

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer Hudson

Part No. OE 1373

Securing Nut

Purchase Order No.	Date	Quantity	Date of 1st Deliv	Shipments 1941	[illegible]	[illegible]	1942	1943	Overrun	Location of Card
66590-P	7-2-42	25000	9-5-42			13651.40	884562		671	Misc
80888-P	5-20-43	5000	6-30-43				396318			Misc
60345-P	10-28-41	12400	11-12-41	589.50	8467.70	3219.30			1240	
63297-P	3-31-42	24800	5-29-42			23436.00			1240	
73511-P	10-26-42	43964	1-11-43				39007.21			
83137-P	6-17-43	25000	7-31-43				14366.16		501	
13451-							578.66			
85535							7053.70			
				589.50	8467.70	40306.50	68814.03			

Packard Electric Co.

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Part No	Number First Order	Description	Shipments 1941	12-1-41 4-30-42	4-30-42 11-30-42	Nov. 30, 1942	Nov. 30, 1943	MAY 30, 1944	Total	Shipments on Orders Received 1941	Prior to April 30, 1942 12-1-41 to 4-30-42	4-30-42 to 11-30-42	1943	Total	After April 30, 1942
33473	34130	Nut	15 180 80	18 467 20	36 531 00	54 650 15				15 180 80	18 467 20	35 651 20	42 80	69 256 40	55 572 95
41471	41146	Nut	1 539 75	35 725 50	102 584 25	70 486 92				1 539 75	35 725 50	84 135 75	-	121 401 00	88 935 42
			16 720 55	54 192 70	139 115 45	125 137 07				16 720 55	54 192 70	119 786 95	42 80	190 657 40	144 508 37
					119 786 95 / 19 328 50										
					54 192 70 / 139 115 45 / 193 308 15										

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer: Packard Electric Division Part No. 33473

										Pieces over-run	Pieces Cancellation
	34130	1-22-41	16000	5-8-41	704000					1600	
	41020	9-4-41	16000	9-8-41	704000	2760				1669	
	42595	10-21-41	15000	11-25-41	660080	552840				1573	
PE	43524	12-1-41	12000	1-3-42		544600				1200	
PE	44309	12-26-41	13000	3-7-42		576000				1400	
	45204	1-5-42	543	1-5-42							
PE	45597	2-3-42	18000	3-21-42		1705 20	621480			1800	
PE	46386	2-24-42	9000	5-23-42			396000			900	
PE	48618	4-8-42	58000	6-20-42			2540440	4280		5800	
	48744	4-9-42	180	5-30-42			7200				
	49739	5-4-42	16400	12-24-42				702480		1640	
PE	52124	6-29-42	2000	7-6-42			88000			200	
PE	54113	8-10-42	32500	1-6-43				1178960			
PE	55299	9-30-42	84000	1-4-43				2057495			34800
PE	68158	7-22-43	30000	8-10-43				1178960			
PE	74625	8-31-43	57000	11-26-43				351400	1881040		1189
	79281	11-11-43	4500								4500
					1518080	1846720	3463120	5465015			

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer Packard Electric Division Part No. 41471

Purchase Order No.	Date	Quantity	Date of 1st delv	Shipments 1941	12-31-41 / 4-30-42	5-1-42 / 11-30-42	1943	1944	Pieces over run	Pieces cancellation
PE 41146	9-8-41	24000	10-25-41	153975	1826025				2400	
PE 44267	12-20-41	37000	3-25-42		1746525	1305975			3700	
PE 45598	2-3-42	17000	6-11-42			1405000			1700	
47513	3-25-42	21189	6-26-42			1792575			2119	
PE 48618	4-8-42	48000	7-31-42			3112525			4800	
PE 49738	5-4-42	25000	11-7-42			78022			363	15000
PE 52299	9-30-42	117500	11-18-42			1064625	706184	40000		
PE 6311	2-3-43	7000	2-27-43				32782			
PE 65651	3-24-43	8600	12-15-42				256	45000		
PE 69947	7-21-43	603	12-21-43				45318	45225		
PE 74676	8-31-43	66000	12-24-43					4931900		
PE 79784	11-11-43	45000	3-21-44					3375000		
82631	12-30-43	37800	5-19-44					2460000		
88949	3-29-44	88	4-17-44					4400		
90637	4-17-44	180	5-19-44					13500		
				153975	3572550	10268425	704486.92			

1417

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

STUDEBAKER

SHIPMENTS AGAINST PURCHASE ORDERS

PART NO.	DESCRIPTION	1941			1942			TOTAL			1941			1942			TOTAL	
110433		386	60															
66408																		
33178																		
33179																		
SK 139A																		
SK 139B																		
SK 139C																		
30041																		
31760																		
34D-10																		
164-9-49																		
		386	60															

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer [illegible]

Part No. 110433.

2 of 12

1 of

Purchase Order No.	Date	Quantity	Date of 1st dely	Shipments 1941	12-1-41 to 4-[illegible]-42	4-[illegible]-42 to 11-30-42	1943	1944	Overrun	Cancelled
PM-419	8-8-41	7500	11-19-41	386 50	2743 65	4744 95				
PM 138	2-16-42	19100	7-23-42	-		9984 45	10375 05		290	
PM 5150	1-25-43	23000	2-25-43				24150 00			
PM 6633	3-27-43	3200	12-31-43					3360 00		
PM 8559	7-5-43	6000	1-12-44					6300 00		
9888	9-21-43	11000	3-25-44					11550 00		
		69800		386 40	2743 65	14929 40	34525 05	21210 00	290	

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer Goodrich Co

Part No. 68408

3 4/12

PM	H18	8-8-43	15000	11-11-43								
PM	1386	2-15-44	18200	11-11-44								
PM	5020	1-14-43	44100	3-23-43								
PM	8560	7-5-43	10000	12-31-43								
	9887	9-12-43	11000	2-20-44								
			78300									

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer Studebaker Corp

Part No. 33278

Purchase Order No.	Date	Quantity	Date of 1st Delay	1941	Shipments [illegible]	[illegible]	1943	1944	Over-Run Cancelled
3640	10-28-41	150	12-29-41	-	79005				79

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer Steel Baker Corp

Part No. 83279

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[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	Over Run	Cancelled
3640	10-28-41	300	1-21-42			842 40				30
MS 9132 (1)		23	1-28-42			71 76				
		323				914 16				

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer Studebaker Corp Part No. BK 139 A

Purchase Order No.	Purchase Order Date	Quantity	Date of 1st dely	1941	Shipments 12-1-41 to 4-28-42	Shipments 4-29-42 to 11-30-42	1943	1944	Over Run	Cancelled
3641	10-23-41	30	12-31-41		7998				23	
15621	3-1-42	123	6-30-42			6177			3	
33633	10-22-42	100	11-30-42			5304			12	
49787	3-4-43	150	3-31-43				9846		13	
14837	1-8-44	400	2-24-44					10011	23	
		1098			7998	11481	9846	10011	174	

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer Studebaker Corp

Part No. SK 139 B

7412

	Purchase Order No.	Date	Quantity	Date of 1st Delv	1941	Shipments [illegible]	[illegible]	1943	1944	Over Run Cancelled
	3641	10-28-41	300	12-11-41		318 42				35
MB	15621	3-9-42	128	6-18-42			188 16			40
MB	33633	10-23-42	100	11-28-42			125 44			12
	49289	3-4-43	150	3-31-43				255 27		51
	94832	7-8-44	400	7-24-44					518 56	63
			1098			318 42	313 60	255 27	518 56	201

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer: Studebaker Corp

Part No. AK. 139 C

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[illegible] No.	[illegible]	Quantity	Date of 1st day	1942	Shipments [illegible]	[illegible]	1943	1944	Over Run	Cancelled
3641	10-28-41	300	11-29-41		219.70				38	
MS 15621	3-9-42	128	4-15-42		221.56				63	
MS 33633	10-23-42	100	11-23-42			122.96			6	
49287	3-4-43	150	3-31-43				243.60		60	
		698			441.26	122.96	243.60		169	

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Customer Studebaker Corp

Part No. 32041

Purchase Order No.	Date	Quantity	Date of 1st dely	1941	Shipments 12-1-41 to 4-28-42	4-29-42 to 11-30-42	1943	1944	Over Run Cancelled
MS 3934	10-29-41	3000	12-30-41		371880				99
MS 34426	10-6-42	1000	10-21-42			1353.60			128
MS 48195	3-17-43	500	4-17-43				621.60		18
MS 55953	5-31-43	6000	9-14-43				8320.05		163
		10500			371880	1353.60	8941.65		408

Customer Studebaker Corp

Purchase Order No.	Date	Quantity	Date of 1st daily	1941	Shipments [illegible]	[illegible]	1943	1944
3934	10-29-41	3000	12-20-41		129168.			
MS 34426	10-6-42	1000	10-21-42			44187.		
MS 48195	3-17-43	500	4-17-43				20202	
MS 55953	5-31-43	6000	9-12-43				393120	
		10500	0.		129168.	44187.	413322	

[fol. 628] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[File endorsement omitted.]

Civil Action

No. 28999

AIRCRAFT & DIESEL EQUIPMENT CORPORATION, a Corporation, Plaintiff,

v.

MAURICE HIRSCH, W. JOHN KENNY, JOHN R. PAUL, H. C. MAULL, JR., GLADDING B. COIT, CARMAN B. BLOUGH, HENRY L. STIMSON, Secretary of War, ROBERT P. PATTERSON, Under Secretary of War, Defendants.

Before Miller, Associate Justice, United States Court of Appeals, District of Columbia, and Bailey and Proctor, Associate Justices, District Court of the United States for the District of Columbia, sitting as a statutory three-judge court.

OPINION—Filed September 28, 1945

Bailey, J:

The plaintiff is a corporation under the laws of the State of Delaware. The defendant Henry L. Stimson was the Secretary of War and the defendant Robert P. Patterson was the Under Secretary of War at the time of the filing of the amended complaint. The remaining defendants are the members of The War Contracts Price Adjustment Board.

This is a suit filed by the plaintiff, seeking a declaratory judgment to the effect that the original Renegotiation Act passed by Congress on April 28, 1942 and the later Act which became effective on February 25, 1944, being Title VII of the Revenue Act of 1943 which amended and re-enacted the Act of April 28, 1942, is each unconstitutional as repugnant to Articles I and II and Amendments V, VII and X of the Constitution of the United States.

[fol. 629] The plaintiff has filed an amended and supplemental complaint in which it also seeks injunctive relief restraining the defendants from further proceeding under

the Renegotiation Act and particularly under Sections 403(c)(2) and 403(e)(1) in so far as said Act and said sections provide for the taking of the plaintiff's "property" without any form of judicial review, and, in addition, injunctive relief restraining the defendants from taking plaintiff's "property" prior to a redetermination by The Tax Court of the United States of the determination of the War Contracts Price Adjustment Board, for the reason that said order was entered by the Board illegally, arbitrarily, capriciously and without regard to the evidence then before it, finally that the enforcement of said order of January 11, 1945 will cause plaintiff irreparable injury, and this latter relief is sought also under the general equity powers of the Court.

The amended complaint states that the plaintiff made a contract with the United States Navy on May 21, 1941, under which it agreed to furnish certain pumps to the United States Navy; that on March 17, 1942 it entered into an agreement supplemental to contract of May 21, 1941, by which plaintiff agreed to furnish certain pumps and other material to the United States Navy, and that during the fiscal year ended November 30, 1943, it furnished to the Navy Department pumps and other material as had not been previously furnished on the supplemental contract of March 27, 1942, and that all the equipment delivered by the plaintiff to the United States Navy in the fiscal year ended November 30, 1943 were all paid for by the United States on or before the 27th day of August 1943; that after certain proceedings and conferences the War Contracts Price Adjustment Board notified plaintiff that it had received excessive profits of $1,265,000 in the fiscal year ended November 30, 1943 and that on or about January 11, 1945 plaintiff was notified of the entrance and issuance of an order by the defendant, Robert P. Patterson, Under Secretary of War, acting as a delegate of the War Contracts [fol. 630] Price Adjustment Board that plaintiff had realized the said excessive profits in the said fiscal year and plaintiff was directed to pay that sum, less applicable taxes previously paid, to the Treasury of the United States; that on February 28, 1945 plaintiff requested the said Board to initiate a review of the above determination but that on May 3, 1945 the Board refused to do so; that under the provisions of Section 403(c)(2) of the Renegotiation Act the Board may direct the defendant Henry L.

Stimson, Secretary of War, to direct contractors or subcontractors for whom the plaintiff had done work under contract or pursuant to sales orders, to withhold such sums of money due the plaintiff as will aggregate $1,265,000 less applicable tax adjustment; that on April 4, 1945 plaintiff, pursuant to right granted by Section 403(c)(1) of the Renegotiation Act, petitioned the Tax Court of the United States to redetermine the excessive profits, if any, realized during the fiscal year ended November 30, 1943; that the United States filed a motion to strike this petition on the ground that it was filed prematurely; that this motion was heard on May 16, 1945 but that in the event The Tax Court shall dismiss said petition, the plaintiff will file another petition in The Tax Court for the same purpose; that "notwithstanding the fact that the plaintiff has filed its petition for redetermination in the Tax Court of the United States whereby it seeks an orderly determination of the amount, if any, it may owe to the United States of America, as excessive profits for its fiscal year ending November 30, 1943," the War Contracts Price Adjustment Board purposes to direct the Secretary of War to withhold moneys due to the plaintiff by said contracts for the account of the United States in the amounts determined by it to be due as excessive profits and the Secretary of War purposes to follow such directions; that in the event of such seizure of such amounts due to the plaintiff or the payment thereof by customers thereof to the Treasury, the amounts so seized or paid would be transferred to the Surplus Fund of the United States Treasury; that the Renegotiation Act [fol. 631]in so far as it may authorize such seizure is in violation of rights guaranteed to the plaintiff by the Constitution of the United States; that there was, as of May 1, 1945, due plaintiff from its customers (they being firms, individuals and corporations, other than the United States of America, or any department, agency or instrumentality thereof) approximately $274,000, and on that date plaintiff had on its books unfilled orders from such customers and others (not the United States of America or any department, agency or instrumentality thereof), calling for the manufacture and sale of its products at prices approximately aggregating $890,000. The said sums now due, or such portion thereof as the War Contracts Price Adjustment Board has determined should be withheld and paid into the Treasury, and other sums which may become

AIRCRAFT & DIESEL EQUIPMENT CORP.

Studebaker Corp. 4401 Ravenswood Avenue CHICAGO, ILL. 31760

11:12

1944

Over Run Cancelled

183
18
48
199

due in the future, Henry L. Stimson or his delegates will, as his delegate Robert P. Patterson did a prior year, direct to be withheld from the plaintiff and paid into the Treasury of the United States. Plaintiff avers that, after adjustment for Federal income and excess profits taxes, the amount involved in the order and decision of War Contracts Price Adjustment Board does not and can not exceed $275,000, but defendant Henry L. Stimson, acting at the threatened direction of the War Contracts Price Adjustment Board nevertheless threatens to, and will, unless enjoined and restrained, order the withholding from the plaintiff and the payment by plaintiff's customers of said sums of money into the Treasury of the United States; that the action of the War Contracts Price Adjustment Board was arbitrary; it refused to state the ground upon which it acted and this was in violation of the provisions of the Constitution in that it acted without due process of law.

The amended complaint further sets out certain transactions which it claims were contracts entered into before the passage of the original Renegotiation Act under which various articles were sold, some of which were sold and delivered after the passage of that Act and some before, and that the action of the defendants in making any redetermination of all profits arising under these contracts [fol. 632] was unconstitutional and void; that as to contracts entered into after the passage of the Renegotiation Act, in so far as they might be controlled by the Act, the Act was so indefinite and uncertain and was unconstitutional in investing administrative bodies with the legislative powers without sufficiently defining the terms and conditions under which these powers were to be exercised.

The amended complaint seeks an injunction enjoining the defendants from eliminating any excessive profits of the plaintiff determined by the War Contracts Price Adjustment Board by directing any customers of the plaintiff to withhold for the account of the United States, or otherwise, any moneys due to the plaintiff or directing any such customers to pay any money due to the plaintiff into the Treasury of the United States.

The preliminary question to be determined is the jurisdiction of equity. In the first place the plaintiff has filed its petition in The Tax Court of the United States, seeking a determination of the amount of excess profits, if any,

Customer Studebaker Corp

Purchase Order No.	Date	Quantity	Date of 1st Daily	1941	Shipments [illegible]	[illegible]	1943	1944
MS 3934	10-29-41	3000	12-19-41		6564.5			
MS 34426	10-6-42	1000	10-21-42			214.13		
MS 55279	5-20-43	4000	6-15-43				76000	
MS 55953	5-31-43	8000					1690.24	
		16000			6564.5	214.13	2450.24	

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

Part No. 34 D 10

11412

Over Run Cancelled

455
127
896
1478

Customer Studebaker Corp

Purchase Order No.	Date	Quantity	Date of 1st Daily	1941	Shipments [illegible]	[illegible]	1943	1944
1:6 7558	12-13-41	1200	2-16-42		7469 40			

AIRCRAFT & DIESEL EQUIPMENT CORP.
4401 Ravenswood Avenue
CHICAGO, ILL.

12462

Part No. 16R 9049

Over Run Cancelled
66

[fols. 626-627] IN UNITED STATES DISTRICT COURT

[Title omitted]

[File endorsement omitted.]

STIPULATION—Filed July 18, 1945

It is hereby stipulated and agreed by and between the parties hereto by their respective attorneys, that certain affidavits and exhibits attached thereto, which for identification, are marked, affidavits of B. Ch. Kelleher, by reference and stipulation made a part of the amended and supplemental Bill of Complaint, and by reference, made a part of the Amended and Supplemental Complaint to be filed by the plaintiff, may be filed separate and apart from the complaint and that notwithstanding such affidavits and exhibits attached thereto are not physically attached to such Amended and Supplemental Complaint, may be treated and considered as if such affidavits and exhibits were physically attached thereto; and that all motions heretofore filed herein shall stand as to the Amended and Supplemental Complaint.

Ga[redacted]her, Rinaker, Wilkinson & Hall, By Arthur R. [redacted] (s), Hill & Crenshaw, By Francis W. Hill, Jr. (s), Attorneys for the Plaintiff, Francis M. Shea (s), Rawlings Ragland (s), Attorneys for the Defendants.

which it has earned if the Renegotiation Act be constitutional. It is enough to say that if The Tax Court of the United States should hold that the plaintiff received no excess profits, then the constitutionality of the Act of Congress is immaterial so far as the rights of the plaintiff are concerned and for that reason the suit is premature.

In addition to this, equity has no jurisdiction for the reason that the plaintiff has complete remedies by actions at law. It claims that certain parties are indebted to it by reason of certain contracts; the payment of these claims under a judgment at law would give a full, adequate and complete remedy. These debtors are not numerous, and so far as the plaintiff's being entitled to relief to avoid a multiplicity of suits, it has a complete remedy in the Court of Claims for all sums of which it may be deprived, if the Renegotiation Act be unconstitutional.

[fol. 633] In the case of *Coffman v. Breeze Corporations, Inc., et al.*, 323 U. S. 316, which was a suit by a patent owner against his licensees, seeking an adjudication of unconstitutionality of the Royalty Adjustment Act and seeking an injunction against the licensees from complying with the Act by paying the balance in excess of royalty payments and in excess of the amount declared by the War and Navy Departments to be fair and just into the Treasury of the United States, the Court held that equity was without jurisdiction. The Act in question in that case deprived the licensor of any remedy. The Court said:

> "The only rights asserted as the basis for the relief sought by appellant are derived from the license agreements. These agreements, so far as now appears and as we assume for present purposes, are contractual obligations to pay the stipulated royalties. As they accrue, the royalties become simple debts recoverable in an action at law, or possibly, where the accounts are complicated, in a proceeding for an accounting such as appellant has already begun in its separate suit pending in the District Court of New Jersey. *Kirby* v. *Lake Shore & M.S.R. Co.*, 120 U. S. 130; *United States* v. *Old Settlers*, 148 U. S. 427, 465.
>
> "Appellant does not in the present suit bring to our attention any facts showing or tending to show that a suit to recover a money judgment for the royalties would not afford complete and adequate relief without

resort to an equitable remedy. In such a suit if appellee Breeze is obligated by the contracts in question to pay the royalties to appellant, it can discharge that obligation only by payment of the amount due, or by setting up the Royalty Adjustment Act as a defense. Compliance with the duty under the Act to pay into the Treasury the royalties withheld from appellant would operate by the terms of the Act as a discharge of the obligation to pay appellant. If that defense were offered, the constitutional validity of these provisions of the Act would be a justiciable issue in the case, since upon its adjudication would depend appellant's right to recovery.

"But whether the provisions of the Act be valid or invalid appellant shows no ground for equitable relief. If valid they would be a defense, and appellant would be entitled to no relief other than that afforded by the suit against the Government authorized by § 2 of the Act. If invalid, appellant's right to recover remains unimpaired. The sufficiency of the defense may be as readily tested in a suit at law to recover the royalties as by the present suit in equity to enjoin payment of the royalties into the Treasury. In either case appellant would receive all the relief to which it shows itself entitled."

[fol. 634] The Act of Congress involved in the *Coffman case* is very similar to the Act in this case and there is no reason why the plaintiff has not a complete and adequate remedy by suit against its customers for any sums that may be due from them, if the Acts be unconstitutional; and, as to any liability on the part of the United States, its remedy is in the Court of Claims.

The plaintiff contends that the *Coffman case* was decided simply upon the ground that the complaint did not allege that the plaintiff in that case would be irreparably injured. It is not sufficient, however, to allege irreparable injury without showing the facts upon which that injury follows. In this case, mere delay in the collection of sums due to the plaintiff, the complaint not stating that the debtors are or are likely to become insolvent, does not constitute irreparable injury.

So far as the administrative procedure is concerned, any defects in the hearing before the War Contracts Price

Adjustment Board are immaterial so long as the plaintiff obtains a full hearing before The Tax Court of the United States. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333.

In the case of *Arrow Distilleries, Inc.* v. *Alexander*, 24 Fed. Supp. 880, which was affirmed by the Supreme Court of the United States in 306 U. S. 615, it was held that one is not entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted, even though the question of the constitutionality of the statute prescribing the administrative remedy is undecided.

We conclude, therefore, that the suit is premature and, in addition, that equity has no jurisdiction.

[fol. 635] The motions of the defendants to dismiss the amended complaint and for a summary judgment will each be sustained without prejudice, however, to the right of the plaintiff to maintain actions at law against its debtors and to bring suit as it may be advised in the Court of Claims.

(s) Justin Miller, (s) Jennings Bailey, (s) James M. Proctor.

[fol. 636] IN UNITED STATES DISTRICT COURT

[Title omitted]

[File endorsement omitted.]

APPLICATION FOR DESIGNATION OF A THREE-JUDGE STATUTORY COURT—Filed February 4, 1946

Plaintiff having filed in this case its Amended and Supplemental Complaint seeking a preliminary and permanent injunction and a declaratory judgment to suspend and restrain the enforcement of the Renegotiation Act, enacted February 25, 1944, Public Law 235, 78th Congress, 50 U.S.C.A. App. 1191, amending Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942, (Public Law 528, 77th Congress), approved April 28, 1942, as amended by Section 801 of the Revenue Act of 1942 (Public Law 753, 77th Congress), approved October 21, 1942, as further amended by Section 1 of the Military Appropriations Act of 1944 (Public Law 108, 78th Congress), approved July 1, 1943, and as further amended

by Public Law 149 (78th Congress), approved July 14, 1943, and to suspend and restrain the enforcement of a certain order of the War Contracts Price Adjustment Board of January 11, 1945 (attached as Exhibit A to the Amended and Supplemental Complaint), which order became operative as of May 3, 1945, on the ground that said Acts, as amended, and the said order are and each is repugnant to the Constitution of the United States.

[fol. 637] That heretofore, on June 6, plaintiff filed herein its Motion to make application for the designation of a three-judge statutory court, and upon said motion having been filed, the Chief Justice of the United States Circuit Court of Appeals for the District of Columbia designated the Honorable Mr. Justice Miller, Associate Judge of the United States Court of Appeals for the District of Columbia, the Honorable Mr. Justice James M. Proctor, Associate Judge of the District Court of the United States for the District of Columbia, to participate with the Honorable Mr. Justice Jennings Bailey, Associate Judge of the District Court of the United States for the District of Columbia, as a three-judge statutory court to hear and determine said matter. That said Court, so constituted, heard arguments of counsel, examined briefs, exhibits, and affidavits filed in said cause, and on September 28, 1945, filed with the Clerk of this Court an opinion in said cause. Thereafter, and before any order was entered thereupon, Mr. Justice Justin Miller resigned as Associate Justice of the United States Court of Appeals for the District of Columbia, effective as of October 1, 1945, and since said date has not acted as a judge of said Court, or as one of the judges of the statutory court impannelled in this cause.

Wherefore, application is hereby made to the Chief Justice of the United States Court of Appeals for the District of Columbia to designate a three-judge statutory court to hear said cause, as provided by the Act of August 24, 1937, 28 U.S.C.A., Section 380(a).

For the Court: Jennings Bailey (s), Justice.

Dated this 4th day of February, 1946.

Approved: Gallagher, Rinaker, Wilkinson & Hall (s), Attorney for plaintiff.

No objection as to form.

Walker Lowry (s), Attorney for defendants.

[fol. 638] IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

[File endorsement omitted.]

ORDER DESIGNATING THREE-JUDGE STATUTORY COURT—Filed February 5, 1946

Upon the request of Jennings Bailey, Associate Justice of the District Court of the United States for the District of Columbia, before whom there is pending in the above entitled cause a Complaint by the plaintiff seeking preliminary and permanent injunction and a declaratory judgment to suspend and restrain the enforcement of an Act of Congress and of an Order of the War Contracts Price Adjustment Board, promulgated allegedly upon the authority thereof, on the ground that such Act and Order are repugnant to the Constitution of the United States, and a three-judge statutory court having heretofore been designated, consisting of Justices Miller, Bailey and Proctor, and it appearing that before any final Order was entered by said Court, Mr. Justice Miller resigned as a judge of said court and has taken no further part in the proceedings in this cause, and notice thereof having been duly given to the Attorney General of the United States, I hereby designate Henry W. Edgerton, Associate Justice of the United States Court of Appeals for the District of Columbia, and James M. Proctor, Associate Justice of the District Court of the United States for the District of Columbia, to participate with Jennings Bailey, Associate Justice of the [fol. 639] District Court of the United States for the District of Columbia, as a three-judge statutory court to hear and determine this matter.

Lawrence D. Groner (s), Chief Justice

Dated this 5th day of February, 1946.

[Fols. 640-641] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

AIRCRAFT & DIESEL EQUIPMENT CORPORATION, Plaintiff,

v.

MAURICE HIRSCH, et al., Defendants.

Civil Action

No. 28999

[File endorsement omitted.]

ORDER AND JUDGMENT—Filed March 5, 1946

This cause having come on to be heard before the Court upon the motion of plaintiff for an interlocutory injunction and upon the motions of defendants to dismiss the amended complaint and for summary judgment, and counsel for plaintiff and defendants having been heard;

Now upon said motions, and upon the pleadings, affidavits, files and records of this case, due deliberation having been had thereon, it is

Ordered that:

(1) The motion for an interlocutory injunction be, and it hereby is, denied,

(2) The amended and supplemented complaint be, and it hereby is, dismissed and,

(3) Summary judgment be, and it hereby is, granted in favor of the defendants.

This order is entered without prejudice to the right of the plaintiff to maintain actions at law against its debtors and to bring suit as it may be advised in the Court of Claims.

Dated: March 5th, 1946.

(s) Henry W. Edgerton, Justice, (s) Jennings Bailey, Justice, (s) James M. Proctor, Justice.

Approved: (s) John F. Sonnett, Assistant Attorney General, Attorney for Defendant.

Approved as to form: (s) Francis W. Hill, Jr., Attorney for plaintiff.

[fol. 642] IN UNITED STATES DISTRICT COURT

[Title omitted]

[File endorsement omitted.]

PETITION FOR INJUNCTION PENDING APPEAL—Filed March 11, 1946

And now comes the Aircraft & Diesel Equipment Corporation, plaintiff in the above entitled cause, and respectfully prays that this Court, pursuant to the provisions of Rule 72 of the Rules of Civil Procedure for the District Court of the United States, grant an injunction restraining the defendants and each of them from directing customers of the plaintiff to withhold for the account of the United States any money due plaintiff from said customers, and likewise restraining the defendants and each of them from directing customers of the plaintiff to pay into the Treasury of the United States any money due plaintiff from said customers, pending the hearing on appeal from an order denying plaintiff's motion for an interlocutory injunction restraining the enforcement, operation and execution of the Renegotiation Act upon the ground that such Act is, or parts thereof are, repugnant to the Constitution of the United States; and in support of such prayer, petitioner alleges:

1. That petitioner proposes to and will file, within the time required by law, a notice and petition for allowance of an appeal to the Supreme Court of the United States [fol. 643] from the order heretofore entered in this cause on the 5th day of March, 1946, denying the plaintiff motions for an interlocutory injunction and a declaratory judgment and dismissing the Amended and Supplemental Complaint and allowing the motions of the defendants to dismiss such Amended and Supplemental Complaint, and for summary judgment, said order reciting that it is without prejudice to the rights of the plaintiff to maintain actions at law against its debtors and to bring suit as it may be advised in the Court of Claims; and petitioner alleges that it will prosecute said appeal in the manner, and within the time, required by law.

2. That the defendants, or either or some of them, will, (as they have admitted by affidavits filed in this cause)

unless restrained by this Court, direct customers of the plaintiff, who have or had contracts with the United States of America, to withhold from moneys otherwise due the plaintiff, such sums of money which will aggregate approximately $275,000, asserted to be due to the United States of America from the plaintiff, after tax adjustments, as excessive profits realized by the plaintiff during its fiscal year ended November 30, 1943, under the Renegotiation Act passed February 25, 1944, as determined on January 11, 1945 by Robert P. Patterson, then Under Secretary of War, now Secretary of War, as delegate of the War Contracts Price Adjustment Board, which said determination some of the defendants acting as the War Contracts Price Adjustment Board confirmed on May 3, 1945, and adopted as the determination of the War Contracts Price Adjustment Board.

3. That if the defendants, either or some of them, direct the withholding by customers of the plaintiff of such sums of money as will aggregate approximately $275,000, and direct the payment thereof into the Treasury of the United [fol. 644] States of America and the customers follow such directions as they will, the petitioner will suffer irreparable injury in that:

A. The petitioner's working capital will be reduced not only by the sum of $204,000 already taken from it upon renegotiation demands for the year ended November 30, 1942, but by the additional amount of approximately $275,000 proposed to be taken, and said working capital will be reduced to $92,000, an amount insufficient to carry on petitioner's program of reconversion to petitioner's peace-time business; all of which said reductions will occur *prior* to any redetermination in The Tax Court of the United States of the amount of excessive profits, if any, realized by petitioner, and all of which said reductions will occur *prior* to any determination of the constitutionality of said Acts under which said amounts are alleged to be due.

B. That plaintiff has over forty (40) customers who owe plaintiff at present approximately $88,000 in fixed amounts; that there are approximately twenty (20) other customers of the plaintiff with whom the plain-

tiff is presently negotiating in respect of claims arising out of termination of contracts, and the amounts of such claims are not now fixed but, as asserted, aggregate $250,000, so that as of the date of filing this petition, it would be necessary for the defendants, or either or some of them, to notify not less than thirty (30) customers of the plaintiff to withhold money due to the plaintiff and to pay into the Treasury of the United States such moneys as they owe the plaintiff in order that defendants may collect $275,000. If such customers are so directed, and refuse to pay plaintiff the amounts now due, as they will, the plaintiff will be required to sue over thirty (30) of its customers (based upon the situation as it exists today), in at least twenty (20) jurisdictions, and will be required to employ at least twenty (20) attorneys in such jurisdictions to institute such suits, and to pay them various sums of money which in the aggregate will be representative of a large sum of money, and plaintiff will also be required to pay large sums of money in and about the prosecution of such suits, for courts costs, witness fees, stenographic fees, and other essential fees and costs.

C. The institution of suits against such thirty (30) customers will seriously impair the good will now subsisting between plaintiff and such customers, and cause such customers to refuse to do further business with plaintiff.

(D) That plaintiff's officers and other employees will be required to absent themselves from their usual duties to testify in such suits as may be required to be instituted, and will be required to duplicate documents, books and records of the corporation which will necessarily be sent to various jurisdictions to prosecute such suits a' ' the orderly administration of the affairs of the plaintiff will thereby be disrupted.

[fol. 645] E. That plaintiff will run the risk of the subsequently impaired credit or insolvency of its customers who may be required to pay money owed to plaintiff into the Treasury of the United States.

4. That the administrative remedy afforded petitioner for a redetermination in The Tax Court of the United

States will not save the petitioner from the irreparable injury which will necessarily follow as heretofore alleged because:

A. Although the petitioner filed its petition in The Tax Court of the United States on May 18, 1944, in respect of renegotiation of its business in its fiscal year ended November 30, 1942, such petition has not yet been marked for trial and it is improbable that it will be tried within the next year.

Notwithstanding this, there has been paid into the Treasury of the United States $204,000 during July, 1944, by customers of the plaintiff, pursuant to the directions of the Under Secretary of War.

Petitioner on July 2, 1945, filed its petition in The Tax Court of the United States for a redetermination of its excessive profits in its fiscal year ended November 30, 1943. Such petition has not been marked for trial and it is improbable that it will be tried within the next year, and it is also improbable that it will be determined within the next year and one-half. There will be an additional $275,000 paid into the Treasury of the United States unless this Court restrains the defendants from directing customers of the petitioner to pay an aggregate of such $275,000 into the Treasury of the United States.

B. That when The Tax Court of the United States shall have made a determination of the amount, if any, which the plaintiff owes to the United States, on business done during its fiscal years ended November 30, 1942 and November 30, 1943, assuming that the Acts be declared constitutional, the present appropriation for the payment of refunds which expires June 30, 1946, will have expired, and no funds will then be available to make any refund, even if such law may be construed so as to make possible refunds upon a determination of The Tax Court of the United States.

C. That there is no jurisdiction in the Court of Claims of claims against the United States, which may be invoked by petitioner, by reason of any refund which may be determined to be due to the petitioner in The Tax Court of the United States.

D. That if The Tax Court of the United States (1) shall have determined that a lesser amount be due for the fiscal year ended November 30, 1942 than the amount determined by Robert P. Patterson, Under Secretary of War, as delegate of the Secretary of War, or (2) shall have determined that a lesser amount be due for plaintiff's fiscal year ended November 30, [fol. 646] 1943 than the amount determined to be due by Robert P. Patterson, as delegate of the War Contracts Price Adjustment Board, or (3) shall have determined that a lesser amount be due than that determined by Robert P. Patterson to be due in both such years, as stated above, the defendants, either or some of them, will have collected the amounts determined by Robert P. Patterson in the sum of $275,000 for plaintiff's fiscal year ended November 30, 1943, as the Secretary of War acting through his delegate, Robert P. Patterson, has already collected $204,000 found by Robert P. Patterson to have been due for plaintiff's fiscal year ended November 30, 1942, plus interest at the rate of 6% per annum from the time the respective determinations were made, until the amounts so determined were and will have been collected, notwithstanding the statutory provision for refunds prescribes that the interest on refunds shall not exceed 4% per annum, and notwithstanding that the plaintiff will thereby be deprived of 2% per annum on money improperly collected from its customers.

E. That in the event the Supreme Court of the United States determines that Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, and the Renegotiation Act are unconstitutional, or that one of said Acts is unconstitutional, as petitioner alleges the Supreme Court of the United States will so determine, all amounts which shall have been paid into the Treasury of the United States, upon orders of the Secretary of War, as aforesaid, will be unavailable to plaintiff even though such moneys ought to be paid by the United States to the plaintiff, because no court is presently constituted with jurisdiction to grant plaintiff any relief for the tortious conduct of the officers and employees of the United States who shall have caused said money owed

by plaintiff's customers to be paid into the Treasury of the United States. It is extremely doubtful whether a determination of the constitutionality of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, or the Renegotiation Act, or either of such Acts, will have been made by the United States Supreme Court prior to June 30, 1946; and the present appropriation for refunds expires, by its terms, June 30, 1946.

5. That petitioner has no remedy in the Court of Claims for any sums of money of which it has already been deprived or of which it will be deprived if Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, or the Renegotiation Act, or both of such Acts, be determined to be unconstitutional. Neither has petitioner any remedy in the Court of Claims, for any sums representative of the difference between the amount determined by The Tax Court of the United States, and the amounts determined by the Under Secretary of War (for the fiscal year ended November 30, 1942) or as determined [fol. 647] by the War Contracts Price Adjustment Board (for the fiscal year ended November 30, 1943), even if either or both said Acts be determined to be constitutional, for the following reasons:

A. Petitioner did heretofore, on the 2nd day of July, 1945, file its petition in The Tax Court of the United States, praying a determination of the amount of its excessive profits realized in the year 1943, and said petition is now pending untried and undisposed of in said Court.

B. That petitioner has no contractual relationship with the United States of America, or any agency or department thereof, which could be the subject matter of a suit in the Court of Claims, all contractual obligations of the United States to the plaintiff having been discharged.

C. That unless restrained by order of this Court, customers of the petitioner will be directed to pay $275,000 owed to petitioner, into the Treasury of the United States, *before* and *prior* to any determination

of the amount of excessive profits, if any, in The Tax Court of the United States; and said payment will be in addition to the $204,000 heretofore paid into the Treasury of the United States *before* and *prior* to any determination made by The Tax Court of the United States on the 1942 petition now pending.

D. In the event the Renegotiation Act be declared unconstitutional, or in the event The Tax Court of the United States (after the Act be found constitutional), determines the excessive profits realized by petitioner to be less than the determination made by the War Contracts Price Adjustment Board, then either all or a part of the money so paid into the Treasury of the United States would rightfully belong to the petitioner, but petitioner would be without remedy to recover such amounts.

E. That in view of time required for either the decision of the Supreme Court on the constitutionality of the Act, or action of The Tax Court of the United States on said two petitions, it is most improbable that such action (either the decision of the Supreme Court of the United States) will occur prior to June 30, 1946, at which time the present appropriations for renegotiation refunds terminates.

F. That petitioner has *no* remedy under the Renegotiation Act in the Court of Claims, and its only right to any relief under the statute will arise *after* the action of The Tax Court of the United States, and then only under the present appropriation for renegotiation refunds, which expires June 30, 1946, which expiration, in all probability, will occur before any decision is reached.

G. That there has already been paid into the Treasury of the United States $204,000 due to petitioner [fol. 648] from customers of petitioner, upon renegotiation demands for the year 1942, prior to any determination as to the constitutionality of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended or any determination of excessive profits by The Tax Court of the United States.

H. That unless restrained by an order of the Court, petitioner will be deprived of $479,999—($204,000 for the fiscal year 1942, and $275,000 for the fiscal year 1943)—*before* and *prior* to any determination as to the constitutionality of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, or the Renegotiation Act by the Supreme Court, and prior to any determination in The Tax Court of the United States of the amount, if any due, to the United States of America, if such renegotiation laws be valid.

I. That petitioner ought not to be deprived of its money due from its customers prior to any decision on the constitutionality of both Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, or the Renegotiation Act, because there exists no adequate remedy to redress the irreparable injury which will result to the plaintiff, if it be required to sue approximately thirty (30) of its customers; such irreparable injury being the loss of the good will it has built up with such customers, the large amounts of money which will be required to pay not less than twenty (20) attorneys in twenty (20) different jurisdictions to sue not less than thirty (30) customers, as well as the costs incident to preparation and prosecution of such cases and the inevitable disruption of the ordinary business of plaintiff by reason of breaking down its filing system, and other vexations incident to a multiplicity of suits at law.

6. That petitioner's plant, machinery, and equipment in the City of Chicago, Illinois, is free from liens and encumbrances of all kinds, and is worth in excess of $260,000; that petitioner is solvent and able to pay any judgment which may be rendered against it for any amount found due as a result of renegotiation if said Renegotiation Act be found constitutional. Under the provisions of Section (c)(2) of the Renegotiation Act, suit may be brought by the United States of America in the District Court of the United States for the Northern District of Illinois, located at Chicago, Illinois, and in such suit all questions heretofore presented by the complaint herein, and by the motions made in said cause, may be adjudicated; that payment

into the Treasury of the United States before a judicial determination of the constitutionality of the Renegotiation [fol. 649] Act, and a determination by The Tax Court of the United States of the amount due, if any, would and does impose unnecessary hardship upon the petitioner.

7. That following the termination of hostilities on August 15, 1945, petitioner was compelled to and is now reconverting to products manufactured prior to war demands; that in such reconversion petitioner will need all available working capital; that the taking of $275,000 due to plaintiff prior to a determination that said sum, or any portion thereof, is due the United States of America will cause unnecessary and irreparable injury to the petitioner, which cannot be obviated by the subsequent repayment at a much later date, even if said sum be repaid.

8. The United States nor the defendants cannot be injured in any way by awaiting the decision on the constitutionality of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, and the Renegotiation Act, and if said Acts be constitutional, by a redetermination of the excessive profits for the fiscal years ended November 30, 1942 and November 30, 1943, if any, due the United States by the petitioner in The Tax Court of the United States, whereas the utility of the petitioner as a useful social institution will be greatly hampered if the defendants be permitted to make the additional collection of $275,000 at this time, when the petitioner is in the midst of a program of reconverting its energies to peace-time pursuits.

Wherefore, the plaintiff prays the entry of an Order under Rule 72 of the Rules of Civil Procedure for the District Courts of the United States, granting an injunction on such reasonable terms as the Court may impose pending the hearing of this cause on appeal.

Aircraft & Diesel Equipment Corporation, By B. Ch. Kelleher, President.

[fol. 650] *Duly sworn to by B. Ch. Kelleher. Jurat omitted in printing.*

[fol. 651] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA—Filed March 29, 1946

The plaintiff, Aircraft & Diesel Equipment Corporation, a corporation, by its attorneys named below, feeling itself aggrieved by the final order of the court entered herein on the 5th day of March, 1946, for reasons set forth in its Assignment of Errors which is filed herewith, hereby prays an appeal from such order, to the Supreme Court of the United States, and further prays a citation be issued as provided by law: that an order be entered fixing the amount of bond and security as the law directs, and that a transcript of the record on appeal be certified and sent to the Supreme Court of the United States.

Aircraft & Diesel Equipment Corporation, By: Arthur R. Hall, Francis W. Hill (s), Woodward Building, Washington 5, D. C.; Arthur R. Hall (s), 231 South La Salle Street, Chicago, Illinois; Attorneys for Plaintiff.

Copy received 3/29/46, John F. Sonnett (s), Attorney for Defendants.

[fol. 652] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

[File endorsement omitted.]

ASSIGNMENT OF ERRORS—Filed March 29, 1946

Aircraft & Diesel Equipment Corporation, appellant herein, assigns as error, in support of its appeal herein, the following:

1. The Court below erred in refusing to grant an interlocutory injunction restraining the enforcement, operation and execution of the Renegotiation Act.

2. The Court below erred in denying plaintiff's motion for a declaratory judgment.

3. The Court below erred in denying plaintiff's motion for an interlocutory injunction.

4. The Court below erred in not granting to plaintiff a hearing on its right under the complaint to a permanent injunction.

4. The Court below erred in not granting to plaintiff a hearing on its right under the complaint to a permanent injunction.

5. The Court below erred in not granting both a temporary injunction and a permanent injunction enjoining the defendants from carrying into operation their plan to cause customers of the plaintiff to withhold moneys otherwise due the plaintiff, and to order said customers to pay moneys owed to the plaintiff into the Treasury of the United States.

6. The Court below erred in sustaining the motion of the defendants for summary judgment.

7. The Court below erred in the entry of a summary judgment.

8. The Court below erred in granting defendants' motion for a summary judgment and entering such judgment.

9. The Court below erred in sustaining the motion of the defendants to dismiss the Amended and Supplemental Complaint.

10. The Court below erred in the entry of the order dismissing the Amended and Supplemental Complaint.

11. The Court below erred in dismissing the Amended and Supplemental Complaint without a hearing on the merits.

12. The Court below erred in not granting both a temporary and a permanent injunction enjoining defendants from carrying into effect their plan to order customers of the plaintiff to withhold moneys due to the plaintiff and to cause moneys due plaintiff from its customers to be paid by such customers into the Treasury of the United States prior to the time The Tax Court of the United States shall have made a determination of the excessive profits, if any.

13. The Court below erred in not enjoining the defendants from carrying into effect their plan to cause customers of the plaintiff to withhold money due to the plaintiff and to cause such money due to the plaintiff in the aggregate

amount of approximately $275,000.00, to be paid into the Treasury of the United States, prior to the time The Tax Court of the United States shall have made its redetermination in accordance with the provisions of the Renegotiation Act.

[fol. 654] 14. The Court below erred in holding that equity had no jurisdiction to determine the questions presented by the Amended and Supplemental Complaint.

15. The Court below erred in holding that equity had no jurisdiction of the cause because the plaintiff had an adequate remedy at law.

16. The Court below erred in not holding that the plaintiff would not suffer irreparable injury as a result of the threatened withholding from plaintiff of sums of money due the plaintiff from its customers, and the threatened ordering of plaintiff's customers to pay money owed to it by its customers to the Treasury of the United States.

17. The Court below erred in holding that equity had no jurisdiction because no irreparable injury would result to the plaintiff if the relief prayed for, the issuance of a temporary injunction and a permanent injunction, were not granted.

18. The Court below erred in holding that equity had no jurisdiction because the plaintiff did not have "numerous customers," which it would be required to sue to obtain relief, if the relief prayed for, as aforesaid, were not granted.

19. The Court below erred in holding that equity had no jurisdiction to grant the relief prayed for to avoid a multiplicity of suits.

20. The Court below erred in holding that the Amended and Supplemental Complaint was prematurely filed.

21. The Court below erred in holding that the suit was prematurely filed because administrative remedies afforded by the Statute are adequate.

[fol. 655] 22. The Court below erred in holding that the suit was prematurely brought because plaintiff's remedies in The Tax Court of the United States had not been exhausted.

23. The Court below erred in dismissing the Amended and Supplemental Complaint without determining the questions of the constitutionality of the Renegotiation Act, Title VII of the Revenue Act of 1943.

24. The Court below erred in dismissing the Amended and Supplemental Complaint without determining whether the proceedings taken under the Renegotiation Act were arbitrary and capricious and not within the powers delegated to the War Contracts Price Adjustment Board by the Renegotiation Act.

25. The Court below erred in not holding the Renegotiation Act to be in violation of the Fifth Amendment to the Constitution of the United States in that it authorizes executive or administrative officers of the United States to take plaintiff's property without paying just compensation therefor.

26. The Court below erred in not holding that the Renegotiation Act is in violation of the Fifth Amendment to the Constitution of the United States in that it permits the taking of plaintiff's property without due process of law.

27. The Court below erred in not holding that the Renegotiation Act is unconstitutional in that it violates Article I, Section 1, of the Constitution of the United States by permitting administrative or executive officers to exercise legislative power vested exclusively in The Congress of the United States.

28. The Court below erred in not holding that the Renegotiation Act is unconstitutional in that by its terms it enables or permits administrative or executive officers of [fol. 656] the United States to exercise the power to make laws, a power exclusively vested in The Congress of the United States under the provisions of Article I, Section 1, of the Constitution of the United States.

29. The Court below erred in not holding that the Renegotiation Act is unconstitutional in that it contained insufficient and inadequate standards for the guidance of the War Contracts Price Adjustment Board to carry out the mandate of The Congress of the United States embraced in such Act.

30. The Court below erred in not holding that the Renegotiation Act is unconstitutional in that it enables or permits executive or administrative officers of the United States to determine that a liability on the part of a person to the United States exists, the amount of such liability, and authorizes such officers to collect the amount of such liability as so determined, all of which said functions are exclusively vested in the judicial branch of the Government of the United States by the provisions of Article III, Sections 1 and 2, of the Constitution of the United States.

31. The Court below erred in not holding that the Renegotiation Act is unconstitutional in that it provides that administrative or executive officers of the United States may determine a case or controversy to which the United States is a party, contrary to the provisions of Article III, Sections 1 and 2, of the Constitution of the United States.

32. The Court below erred in not holding the Renegotiation Act is unconstitutional in that it deprives a person of a jury trial in a cause which the United States of America purports to have against such person, when the amount involved exceeds Twenty ($20.00) Dollars.

[fol. 657] 33. The Court below erred in not holding the Renegotiation Act unconstitutional in so far as the effect of the provisions of Sections 403 (c) (2) and 403 (c) (1) are concerned in that said Sections authorize administrative or executive officers of the Government of the United States to take a person's property before the administrative process by which the amount due to the United States from such person has been finally determined; in violation of the due process clause of the Fifth Amendment.

34. The Court below erred in not holding the Renegotiation Act unconstitutional because it precludes in its terms any opportunity by the plaintiff to have a constitutionally organized court determine whether its property has been taken without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

35. The Court below erred in not holding the Renegotiation Act unconstitutional as violative of the Fifth Amendment to the Constitution of the United States in that it purports to authorize the taking of property which

had vested in the plaintiff prior to the enactment of the Renegotiotion Act.

36. The Court below erred in dismissing the Amended and Supplemental Complaint without determining the questions of the constitutionality of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended prior to February 25, 1944.

37. The Court below erred in dismissing the Amended and Supplemental Complaint without determining whether the proceedings taken under Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as [fol. 658] amended prior to February 23, 1944, by the delegate of the Secretary of War, were arbitrary and capricious and not within the powers delegated to the Secretaries as defined in said Act.

38. The Court below erred in not holding Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended prior to February 25, 1944, to be in violation of the Fifth Amendment to the Constitution of the United States in that it authorizes appointive executive or administrative officers of the United States to take plaintiff's property without paying just compensation therefor.

39. The Court below erred in not holding Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended prior to February 25, 1944, to be in violation of the Fifth Amendment to the Constitution of the United Staates in that it permits the taking of plaintiff's property without due process of law.

40. The Court below erred in not holding that Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended prior to February 25, 1944, is unconstitutional in that it violates Article I, Section 1, of the Constitution of the United States by permitting executive or administrative officers to exercise legislative power vested exclusively in The Congress of the United States.

41. The Court below erred in not holding that Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended prior to February 25, 1944, is unconstitutional in that by its terms it enables or per-

mits executive or administrative officers of the United States to exercise power to make laws, which power is exclusively vested in The Congress of the United States under the provisions of Article I, Section 1, of the Constitution of the United States.

[fol. 659] 42. The Court below erred in not holding that Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended prior to February 25, 1944, is unconstitutional in that it does not contain sufficient or adequate standards for the guidance of the Secretaries as described in such Act, to carry out the mandate of The Congress of the United States embraced in such Act.

43. The Court below erred in not holding that Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended prior to February 25, 1944, is unconstitutional in that it enables or permits executive or administrative officers of the United States to determine that a liability on the part of a person to the United States exists, the amount of such liability, and authorizes executive or administrative officers to collect the amount of such liability as so determined, functions which are exclusively vested in the judicial branch of the United States by the provisions of Article III, Sections 1 and 2, of the Constitution of the United States.

44. The Court below erred in not holding that Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended prior to February 25, 1944, is unconstitutional in that it provides that administrative or executive officers of the United States may determine a case or controversy to which the United States is a party, contrary to the provisions of Article III, Sections 1 and 2, of the Constitution of the United States.

45. The Court below erred in holding that the suit was prematurely brought because plaintiff has a remedy in the Court of Claims.

46. The Court below erred in not holding that Section 403 of the Sixth Supplemental National Defense Appro- [fol. 660] priation Act, 1942, as amended prior to February 25, 1944, is unconstitutional in that it deprives a person of a jury trial in a cause which the United States of

America purports to have against such person, when the amount involved exceeds Twenty ($20.00) Dollars.

47. The Court below erred in not holding that Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended prior to February 25, 1944, together with Section 403(e)(2) of the Renegotiation Act, unconstitutional, in so far as the effect of such Acts construed together as concerned, in that said Sections authorize administrative or executive officers of the United States to take plaintiff's property before the administrative process by which the amount due to the United States from such person has been finally determined, in violation of the due process clause of the Fifth Amendment.

48. The Court below erred in not holding Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended prior to February 25, 1944, unconstitutional, because it precludes in terms, any opportunity by the plaintiff to have a constitutionally organized court determine whether its property has been taken without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

49. The Court below erred in not holding Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended prior to February 25, 1944, unconstitutional, as violative of the Fifth Amendment to the Constitution of the United States in that it purports to authorize the taking of property which has been vested in the plaintiff prior to the enactment of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942.

50. The Court below erred in not holding the Renegotiation Act and Section 403 of the Sixth Supplemental [fols. 661-711] National Defense Appropriation Act, 1942, as amended prior to February 25, 1944, to be unconstitutional in that each of said Acts enables executive and administrative officers of the United States to take plaintiff's property before plaintiff had any opportunity of any hearing in respect of the amount due, in violation of the Fifth Amendment to the Constitution of the United Stataes.

51. The Court below erred in not holding the Renegotiation Act and Section 403 of the Sixth Supplemental

National Defense Appropriation Act, 1942, as amended prior to February 25, 1944, to be arbitrary, capricious unequal in operation and in result in violation of the Fifth Amendment to the Constitution of the United States in that it purports to enable the taking of plaintiff's property without due process of law.

52. The Court below erred in dismissing the Amended and Supplemental Complaint without determining that the provisions of the Renegotiation Act and Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended prior to February 25, 1944, were unconstitutional as violative of the Fifth Amendment to the Constitution of the United States in so far as such Acts purport (a) to authorize administrative or executive officers to revise contracts in existence prior to the enactment of either of such laws, and (b) to revise contracts which had been fully performed by plaintiff prior to enactment of either Act.

53. The Court below erred in not remanding the complaint to the District Court of one judge to determine whether the actions taken by the War Contracts Price Adjustment Board came within the purview of the Renegotiation Act so that such Court could grant appropriate relief.

Respectfully submitted, Gallagher, Rinaker, Wilkinson & Hall, Arthur R. Hall, Attorneys for Plaintiff-Appellant.

Copy received 3/29/46, John F. Sonnett, Attorney for Defendants.

[fol. 712] IN UNITED STATES DISTRICT COURT

[Title omitted]

[File endorsement omitted.]

STIPULATION WITH RESPECT TO THE RESIGNATION OF CERTAIN DEFENDANTS AND THE APPOINTMENT OF SUCCESSORS—Filed March 30, 1946.

It is stipulated, but solely for the purpose of this stipulation, that:

1. W. John Kenny, Gladding B. Coit and Carman B. Blough have resigned from the War Contracts Adjustment Board and that E. D. Dougal, Jr., George P. Luce and Norman L. Burton have been appointed to and are now serving as members of said Board.

2. That Henry L. Stimson has resigned as Secretary of War and Robert P. Patterson has been appointed Secretary of War and is now acting as Secretary of War, and as Secretary under the provisions of the Renegotiation Act.

3. Robert P. Patterson has resigned as Under Secretary of War and Kenneth G. Royall has been appointed Under Secretary of War, and is now acting as Under Secretary of War and as delegate of the War Contracts Price Adjustment Board and as delegate of Robert P. Patterson, Secretary of War.

4. In the view of the plaintiff there is substantial need for continuing and maintaining this proceeding.

[fol. 713] 5. This action may be continued as an action against the aforesaid successors in office and an order may be entered substituting the said successors in office in lieu of their predecessors, the stipulation and the order, however, to be without prejudice to the claim of defendants, including the substituted defendants, that this action is in reality one against the United States which has not consented to be sued, and without prejudice to the claim of the plaintiff that it is an individual action.

Francis W. Hill, Jr., Attorney for Plaintiff, John F. Sonnett, Assistant Attorney General, Attorney for Defendant.

[fol. 714] IN UNITED STATES DISTRICT COURT

[Title omitted.]

[File endorsement omitted.]

ORDER FOR SUBSTITUTION OF PARTIES—Filed April 2, 1946

The Court finding from the stipulation of the parties that the defendants, W. John Kenny, Gladding B. Coit and Carman B. Blough, have resigned as members of The War Price Adjustment Board and that E. D. McDougal, George P. Luce and Norman L. Burton have been appointed to and are now serving on said Board, and that the defendants Henry L. Stimson, described as Secretary of War, and Robert P. Patterson, described as Under Secretary of War, have been substituted in office respectively by Robert P. Patterson and Kenneth C. Royall, and that there is substantial need for maintaining and continuing this action, it is, this 2nd day of April

Ordered That E. D. McDougal, George P. Luce, Norman L. Burton, Robert P. Patterson, described as Secretary of War, and Kenneth C. Royall, described as Under Secretary of War, be and they hereby are, substituted as defendants, described as in their respective positions, for the original defendants, W. John Kenny, Gladding B. Coit, Carman B. Blough, Henry L. Stimson, Secretary of War, and Robert P. Patterson, Under Secretary of War.

This Court approves the agreement of the parties that this Order and its entry shall be without prejudice to the claim of defendants that this action is in reality one against the United States which has not consented to be sued and without prejudice to the claim of plaintiff that it is an individual action.

Presented by France W. Hill, Jr.

Henry W. Edgerton (s), Justice.

[fol. 715] Jennings Bailey (s), Justice, James M. Proctor (s), Justice.

Consented to: John F. Sonnett (s), Assistant Attorney General.

[fol. 716] IN UNITED STATES DISTRICT COURT

[Title omitted]

[File endorsement omitted.]

ORDER FOLLOWING APPEAL—Filed April 3, 1946

It appearing to the court that the plaintiff, Aircraft & Diesel Equipment Corporation, has filed its petition for appeal to the Supreme Court of the United States, and has filed therewith (a) its assignment of errors and (b) its statement as to the jurisdiction of the Supreme Court of the United States, as required by Rule 12 of the Rules of the Supreme Court of the United Stataes, duly disclosing that the Supreme Court of the United States has jurisdiction upon appeal to review the order in question.

It is ordered that the appeal prayed for be the same is hereby allowed and granted to the Supreme Court of the United States from the order rendered in this cause on the 5th day of March, 1946; and it is

Further ordered that the clerk of said court shall prepare and certify a transcript of the record, proceedings and order in this cause and transmit the same to the Supreme Court of the United States so that he shall have the same in said court within 30 days of this date; and it is

Further ordered that the plaintiff give a bond with good and sufficient security in the sum of Two Hundred and Fifty dollars ($250.00), that it as appellant shall prosecute its appeal to effect, and answer all costs if it fails to [fol. 717] make its appeal good.

And it appearing that the plaintiff, Aircraft & Diesel Equipment Corporation, plaintiff, has filed herein its "Motion To Enjoin Defendants Pending Appeal" and its verified "Petition For Injunction Pending Appeal", pursuant to Rule 62 of the Rules of Civil Procedure for the District Courts of the United States, therein praying an injunction restraining the defendants and each of them from directing customers of the plaintiff to withhold for the account of the United States any money due plaintiff from its said customers, and likewise restraining the defendants and each of them from directing customers of the plaintiff to pay into the treasury of the United States any money due plaintiff from said customers, pursuant to the provisions of The Renegotiation Act, pending the

hearing on appeal from the order of this court entered March 5, 1946, denying the plaintiff's motion for interlocutory injunction as prayed in the Amended and Supplemental Complaint and entering summary judgment in favor of the defendants and dismissing plaintiff's cause of action.

And the court having examined said "Petition for Injunction Pending Appeal" and the Amended and Supplemental Complaint filed herein, together with exhibits attached thereto, and made a part thereof, and having heard the arguments of counsel for and in opposition to the allowance of said injunction pending appeal, and the court having satisfied itself that the fact and circumstances shown to exist, warrant and justify the issuance of such injunction pending appeal upon the filing of a good and sufficient bond in the sum of $100,000 conditioned as required by the Rules of this court, and in form as approved by this court.

[fols. 718-734] It is ordered by the court that the defendants and each of them are hereby restrained from directing customers of the plaintiff to withhold for the account of the United States any moneys due plaintiff from said customers and they are likewise restrained from directing customers of the plaintiff to pay into the Treasury of the United States any moneys due plaintiff from said customers, pending a decision on the appeal in the cause this day allowed and the return of the mandate thereon, or until further order of this Court; provided the plaintiff shall file bond in this cause within twenty days from the date hereof in the sum of $100,000 and in the form approved by this Court.

Entered this 3rd day of April, 1946.

Henry W. Edgerton (s), Jennings Bailey (s), James M. Proctof (s), Judges.

Seen: John F. Sonnett, Assistant Attorney General.

A true copy. Test: Charles E. Stewart, Clerk, By R. Page Belew, Deputy Clerk.

[fol. 735] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY, AND A DESIGNATION OF THE PARTS OF THE RECORD WHICH IT DEEMS NECESSARY FOR A CONSIDERATION THEREOF, FILED PURSUANT TO RULE 13, PARAGRAPH 9, OF THE REVISED RULES OF THIS COURT—Filed May 1, 1946

Comes now Aircraft & Diesel Equipment Corporation, the Appellant in the above entitled cause, and states that the points upon which it intends to rely in this case are as follows:

I

The doctrine of exhaustion of administrative remedies upon which the decision and order of the District Court is partially based has no application where (a) the law from which the administrative body derives its authority is unconstitutional, or (b) where remedy is doubtful or the procedure is defective, or (c) where unreasonable delay has been encountered before the administrative agency and the result of such delay constitutes and threatens irreparable injury.

II

[fol. 736] The District Court in applying the doctrine of exhaustion of administrative remedies has overlooked the facts that (a) the plaintiff has for each of the years 1942 and 1943 filed in apt time, its petition for redetermination in The Tax Court of the United States where said petitions are now pending, and (b) that $204,000 of plaintiff's money was taken as excessive profits less tax adjustments, for the year 1942 *after* the petition for redetermination for the year 1942 was filed in The Tax Court and while said petition was and is still pending, and (c) that defendants propose to take an additional $270,000 for the year 1943 *after* the petition for redetermination for the year 1943 had been filed in The Tax Court and while said petition was and is still pending.

III

In holding that this suit attacking the constitutionality of the renegotiation acts is premature in that The Tax Court may find that plaintiff realized no excessive profits

and, therefore, the constitutionality of the acts are immaterial to plaintiff, the District Court has overlooked the fact that under the acts plaintiff's property has been taken and additional property will be taken pursuant to such unconstitutional acts before any determination has been made by The Tax Court as to the validity of such acts (if such determination can be made there), or as to the amount of excessive profits, if any, realized by the plaintiff.

IV

In holding that equity has no jurisdiction for the reason that plaintiff has an adequate remedy at law by (a) suits against its debtors, and (b) in the Court of Claims for all such sums of which plaintiff has been deprived, the District Court overlooked the fact that to recover $270,000 the plaintiff would be required to bring twenty (20) or more suits in various cities and states against its customers whose good will plaintiff desires to retain, that such action would necessitate the employment of attorneys in each of such places and the attendance in such localities of plaintiff's officers as witnesses; and the court has likewise overlooked the fact that, unlike the Royalty Adjustment Act, the Renegotiation Act affords no access to the Court of Claims, and by the provisions of Section 403(e)1 the jurisdiction of The Tax Court is made exclusive and its determination final and not subject to review by any court or agency.

V

A court of equity will grant relief where the remedy at law is not as complete, practical and efficient as that which the equity could afford.

[fol. 737]

VI

A court of equity will grant relief pending a determination of the validity of a law where the failure to grant such relief will result in depriving plaintiff of its property without any adequate means of redress in the event the law under which the property is taken is subsequently determined to be invalid.

VII.

The allegations of the complaint, which are admitted by the motion to dismiss, show that the denial of the injunction would result in irreparable injury to the plaintiff in that it would (a) compel plaintiff to sue numerous customers in various cities and states with the attendant loss of good will and at great loss of time and expense, (b) compel plaintiff to risk the subsequent impairment of the credit of its debtors, and (c) impair plaintiff's working capital.

VIII

If both acts shall be determined constitutional, an equity court has jurisdiction to and should restrain the taking of plaintiff's property until The Tax Court shall have made its determination of the alleged excess profits realized by the plaintiff.

IX

A statute which purports to authorize an administrative agency or agencies to assert a claim for money (not taxes) against a citizen and to take the property of the citizen in payment of that claim, prior to the completion of the determination of the administrative agency, when the delay of the agency is not due to any failure to act of the citizen, is unconstitutional and void.

X

Both Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942, as amended, and the Renegotiation Act are unconstitutional and void in that both Acts, contrary to the provisions of Article I of the Constitution of the United States of America, purport to empower administrative or executive officers to exercise legislative power vested exclusively in the Congress of the United States.

XI

Both Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942, as amended, and the Renegotiation Act are unconstitutional and void in that both of said acts, contrary to the provisions of Article III, [fol. 738] Sections 1 and 2 of the Constitution of the United States vesting such functions exclusively in the Judicial Branch of the Government, purport to permit

executive or administrative officers of the United States to determine a liability on the part of a person to the United States (not for taxes), and to collect the amount so determined.

XII

Both Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942 and the Renegotiation Act are unconstitutional and void in that said acts, contrary to the provision of Article VII of the Constitution of the United States, purport to deprive a person of a jury trial in a cause in which the United States asserts a claim in excess of Twenty Dollars ($20.00).

XIII

Both Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942, as amended, and the Renegotiation Act are unconstitutional and void in that both acts, contrary to the Fifth Amendment of the Constitution of the United States, purport to authorize a taking of private property without paying just compensation therefor, and without due process of law.

XIV

Both Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942 and the Renegotiation Act are unconstitutional and void in violation of the Fifth Amendment of the Constitution of the United States in that both acts purport to authorize the taking of private property which had vested in the plaintiff prior to the enactment of said acts, without just compensation and without due process of law.

XV

The Renegotiation Act purports to act retroactively and by such action to take property without just compensation or due process of law in that said act, enacted February 25, 1944, purports to be applicable to all amounts received or accrued after June 30, 1943. Plaintiff's fiscal year ended November 30, 1943. All sales in that year were made more than two months before the enactment of the Renegotiation Act. The doctrine of anticipation of legislation sometimes applied to tax laws with retroactive effect has no application here.

XVI

The first act (Section 403 of the Sixth Supplemental National Defense Act) is unconstitutional and void in that it purports to act retroactively and to take property of the plaintiff without the payment of just compensation and [fol. 739] without due process of law. This act was enacted April 28, 1942, and purports to subject to renegotiation all sales where delivery had not been made or full consideration made prior to that date. In determining the sales subject to renegotiation for the years 1942 and 1943, the determination of the Under Secretary of War (a) ignores the fact that receipts and collections were made prior to April 28, 1942, and includes said amounts so collected in the amounts alleged to be subject to renegotiation, (b) ignores the fact that a substantial portion of the sales in said years, 1942 and 1943, were made under contracts made prior to April 28, 1942. In the event the plaintiff's commitments alleged by it to be contracts were not legal contracts as is asserted by defendants but became contracts only upon the receipt of individual purchase orders, then a lesser portion, but still a substantial amount, of the sales made in the years 1942 and 1943 were upon such individual purchase orders made prior to April 28, 1942, all of which said sales were erroneously included as being subject to renegotiation in the years 1942 and 1943.

XVII

The provisions of Section 403(e)(1), purporting to vest in The Tax Court (a branch of the Executive Department) exclusive jurisdiction of renegotiation claims and to deprive the plaintiff of any form of judicial review is in violation of Sections 1 and 2 of Article III of the Constitution of the United States, Article VII of the Constitution of the United States and of the Fifth Amendment to said Constitution. The decision of the Supreme Court in *Macauley* v. *Waterman*, 66 S. Ct. 712, does not control this case since plaintiff here has sought relief through the administrative remedies provided by statute, and, while so doing, has been deprived of its property prior to action by the administrative agency.

Appellant further states that the only parts of the record as filed in this court deemed necessary to be printed

for the consideration of the points set forth above, are as follows:

	Title of Paper	Record Page
(1)	Title Page.	1
(2)	Affidavit of B. Ch. Kelleher filed June 18, 1945.	246-252
(3)	Order of Court granting leave to file Amended and Supplemental Complaint, entered June 18, 1945.	253
(4)	Amended and Supplemental Complaint, including Exhibits A to E, both inclusive, and excluding Exhibit F filed July 2, 1945.	254-293
[fol. 740]		
(5)	Affidavits of B. Ch. Kelleher filed July 2, 1945, omitting exhibits.	332-339; 341-347; 408-415
(6)	Stipulation, filed July 18, 1945, that affidavits and exhibits be made a part of the Amended and Supplemental Complaint.	626
(7)	Motion of defendants to dismiss and for summary judgment without exhibits.	92, 93
(8)	Opinion of the Court, filed September 28, 1945	628-635
(9)	Order and Judgment, dismissing the Amended and Supplemental Complaint entered March 5, 1945.	640
(10)	Petition for Injunction pending appeal, filed March 11, 1946.	642-650
(11)	Petition for Appeal, filed March 29, 1946.	651
(12)	Order Allowing Appeal, entered April 3, 1946.	716-718

Dated this — day of — A.D. 1946.

Earl B. Wilkinson, Arthur R. Hall, Samuel W. Witwer, Jr., J. Alfred Moran, 231 South LaSalle Street, Chicago, Illinois, Francis W. Hill, Jr., Woodward Building, Washington, D. C., Counsel for Appellant.

[fol. 741] Due service and receipt of a copy of the foregoing statement of points to be relied upon and designa

tion of the parts of the record to be printed is hereby acknowledged, this 1st day of May, A.D. 1946.

John F. Sonnett, By Walker W. Lowry, Counsel for Appellees.

[fol. 741a] [File endorsement omitted.]

[fol. 742] IN THE SUPREME COURT OF THE UNITED STATES
APPELLEES' DESIGNATION OF THE PARTS OF THE RECORD WHICH THEY DEEM MATERIAL FOR THE CONSIDERATION OF THE POINTS ON WHICH APPELLANT INTENDS TO RELY—Filed May 10, 1946

The Solicitor General on behalf of the appellees herein, pursuant to Rule 13, paragraph 9 of the rules of this court, designates the following as additional parts of the record which he thinks material for consideration of the points upon which the appellant states it intends to rely:

	Description	Record Page
(1)	Motion for preliminary injunction.	82-83
(2)	Patterson affidavit and exhibits.	94-163
(3)	Hensel affidavit.	164-230
(4)	Hirsch affidavit.	231-232
(5)	Wofford affidavit.	233-234
(6)	Attached statement and exhibits.	235-244
(7)	Transmittal letter of determination of excessive profits.	245
[fol. 743]		
(8)	Exhibit F to amended complaint.	294-331
(9)	Recapitulation.	340
(10)	Exhibits R-1 thru R-16 and R-x.	348-407
(11)	Exhibits B-1 thru B-15 and Exhibit B-x attached to Kelleher affidavit of June 29, re General Motors Corporation (Buick)	416-465
(12)	Kelleher affidavit of June 29, 1945 re Chevrolet Motor and Axle, and Exhibits C-1 thru C-10 and Exhibit C-x.	466-510
(13)	Kelleher affidavit of June 29, 1945 re Allison Division, and Exhibits A-1 thru A-12 and Exhibit A-x.	511-557

(14) Kelleher affidavit of June 29, 1945 re U. S. Navy Department, and Exhibits N-1 and N-x. 558-567

(15) Kelleher affidavit re Woodward Governor Co. and Exhibits W-1 thru W-7 and Exhibit W-x. 568-586

(16) Kelleher affidavit re Hudson, Westinghouse, Studebaker, Packard Electric, and Exhibit 1, 2, and 3. 587-625

(17) Application for and designation of three-judge court. 636-639

(18) Order for substitution of parties. 714-715

(19) Order allowing appeal. 716-718

Dated this 10th day of May, 1946.

J. Howard McGrath, Solicitor General.

[fol. 743a] [File endorsement omitted.]

[fol. 744] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—Filed May 27, 1946.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Mr. Justice Jackson took no part in the consideration or decision of this question.

Endorsed on cover: File No. 50,886, District of Columbia, D. C., U. S., Term No. 95. Aircraft & Diesel Equipment Corporation, Appellant, vs. Maurice Hirsch, E. D. McDougal, John R. Paul, et al. Filed May 1, 1946. Term No. 95 O.T. 1946.

FILE COPY

192

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CLERK

SUPREME COURT OF THE UNITED STATES

744458
Supr. Ct

OCTOBER TERM, 1945

No. [redacted] 95

AIRCRAFT & DIESEL EQUIPMENT CORPORATION,
Appellant,

vs.

MAURICE HIRSCH, E. D. McDOUGAL, JOHN R. PAUL, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

STATEMENT AS TO JURISDICTION

ARTHUR R. HALL,
Counsel for Appellant.

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 28999

AIRCRAFT & DIESEL EQUIPMENT CORPORATION,
A CORPORATION,

Plaintiff,

vs.

MAURICE HIRSCH, ET AL.,

Defendants

JURISDICTIONAL STATEMENT UNDER RULE 12 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES.

The basis upon which it is respectfully contended that there is jurisdiction on appeal in the Supreme Court of the United States to review the order of this Court entered on the 5th day of March, 1946, denying the motions of the plaintiff for an interlocutory injunction and for a declaratory judgment, and dismissing the Amended and Supplemental Complaint, and granting summary judgment in favor of the defendants, is as follows:

I

The Statutory Provision Believed to Sustain the Jurisdiction

The statute believed to sustain the jurisdiction of the Court is the Act of Congress of August 24, 1937, 50 Stat. 751, Section 3 (28 U. S. C. A. 380(a)).

Jurisdiction was so recognized by this Court in *Mine Safety Appliances Company* v. *Forrestal*, — U. S. —, No. 71, October Term, 1945, decided December 10, 1945, 14 L. W. 4048; *Coffman* v. *Breeze Corporation*, 323 U. S. 316; *Oklahoma* v. *Guy F. Atkinson Co.*, 313 U. S. 508.

II

Statutes of the United States Involved in This Proceeding

The statutes of the United States, the validity of which are involved, are as follows:

(1) Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942 (Public Law 528, 77th Congress, Chapter 247, 56 Stat. 226, 245), approved April 28, 1942, as amended by

(2) Section 801 of the Revenue Act of 1942 (Public Law 753, 77th Congress, Chapter 619, 56 Stat. 798, 982), as further amended by

(3) Section 1 of the Military Appropriations Act of 1944 (Public Law 108, 78th Congress, Chapter 158, 57 Stat. 347, 348), approved July 1, 1943, as further amended by

(4) Public Law 149, 78th Congress, approved July 14, 1943, Chapter 239, 57 Stat. 564; U. S. C. 1940 Ed. Supp. III Appendix 1191; said above mentioned statutes being referred to herein as the "First Act" or the "First Renegotiation Act", and

(5) Section 701 of the Revenue Act of 1943 (Public Law 235, 78th Congress) effective February 25, 1944, 58 Stat. 78, 92, 50 U. S. C. A. Appendix 1191 (herein referred to as the "Renegotiation Act" or the "Second Act").

The Renegotiation Act (February 25, 1944) is now printed in 50 U. S. C. A. Appendix 1191, without the First Act.

Both of the Acts purport to provide a means by which the United States of America may recover from contractors and subcontractors, "excessive profits" alleged to have been realized by such contractors or subcontractors upon sales made to departments or agencies of the United States therein named. Under Section 403 (a) (4) of the First Act, "excessive profits" are "any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits." This Act contained no standards or guides for the determination of alleged excessive profits, except the ultimate determination of the "Secretary" as defined in the Act. The Act purports to vest in such Secretary the power of making such determination if no agreement with the contractor was reached. No review of the determination made by the Secretary was provided by the "First Act."

Under the Renegotiation Act (the "Second Act" effective, if valid, February 25, 1944), "excessive profits" are that part of the profits derived from contracts with the Departments and subcontracts which are determined in accordance with Section 403 (a) (4) (A) to be excessive. This section provides that in determining excessive profits there shall be taken into consideration seven factors, therein named. Section 403 (e) (1) of the "Second Act" provides for a review by the Board of any determination made by the Board's delegate, and for a redetermination of "excessive profits" by The Tax Court of the United States; and Section 403 (e) (2) provides for a redetermination of prior determination made by the Secretaries (under the First Act) upon compliance with the requirements therein set forth. Section 403 (e) (1) provides that the filing of the petition in the Tax Court of the United States shall not operate to stay the execution of the order of the War Contracts Price Adjustment Board, and purports to vest in The

Tax Court of the United States final and exclusive jurisdiction.

The "First Act" being Section 403 of the Sixth Supplemental National Defense Appropriations Act of 1942, as amended, which in terms pertains to plaintiff's profits for the year ended November 30, 1942, and the "Second Act" being Section 701 (b) of the Revenue Act of 1943, commonly called the Renegotiation Act, which in terms pertains to plaintiff's profits for the year ended November 30, 1943, are and each is copied verbatim herein as Appendix "A" and "B", respectively.

III

Date of Decree and Application for Appeal

The date of the decree and judgment order, denying plaintiff's motions for an interlocutory injunction and for a declaratory judgment, dismissing the case and entering summary judgment for defendants on defendants' motion, is March 5, 1946. The date upon which the application for appeal herein was presented is March 29, 1946.

IV

Nature of the Case

The Amended and Supplemental Complaint was filed to restrain the War Contracts Price Adjustment Board, the Secretary of War, and the Under Secretary of War from issuing an order under the Second Act (the Renegotiation Act), requiring customers of plaintiff (not the United States of America or any agency or department thereof) to pay in to the Treasury of the United States, money owed to the plaintiff by such customers, in amounts which the defendants constituting the War Contracts Price Adjustment Board had determined to be "excessive profits" pursuant to the provisions of the Second Act.

The issues raised by the Amended and Supplemental Complaint, and by the motion of the plaintiff for an interlocutory injunction, were the constitutionality of the Renegotiation Act (February 25, 1944) and of Section 403 of the Sixth Supplemental National Defense Appropriations Act (April 28, 1942), as amended.

Plaintiff alleged that the Second Act and the First Act were and each was unconstitutional, being violative of Article I, Section 1; Article III, Sections 1 and 2 of the Constitution of the United States, and of the Fifth, Seventh and Tenth Amendments thereto.

The constitutionality of the First Act is called into question because if it be true that the First Act is unconstitutional, the Government has already collected $204,000 of plaintiff's money to which it was not entitled, and unless restrained will collect an additional $275,000.

Considering, for the purpose only of this contention, that the Second Act be constitutional, the administrative officers of the Government should not be permitted to collect $275,000, but only $275,000 less the $204,000 already illegally collected under the First Act. The Government would then have collected $275,000 determined to be due under the Second Act, i. e., $204,000 illegally collected under the First Act and $71,000 under the Second Act, or a total of $275,000 determined to be due under the Second Act.

We believe that a court of equity under its broad equity powers and under the prayer for general relief, has the power and should exercise the power to enjoin its administrative officers from collecting more money than is in any event due to the Government.

In addition to the allegations as to the constitutionality of the Acts, plaintiff alleged that even if the Acts were constitutional, the defendants had exceeded their statutory authority and were acting illegally, and that no order

should be directed to plaintiff's customers by the Secretary of War until The Tax Court of the United States had acted upon plaintiff's petitions for redetermination of alleged excessive profits for the fiscal years 1942 and 1943, which petitions were then and now are pending in The Tax Court of the United States.

The complaint alleged, and the affidavits filed by the defendants admitted, that unless the Court entered the injunctive order as prayed, restraining the Secretary of War, he would do as he had done in the previous year, namely, direct customers of the plaintiff (who were not the United States of America or any agency or department thereof) to pay into the Treasury of the United States the amount of the determination of excessive profits by the War Contracts Price Adjustment Board (less applicable tax adjustments) before a redetermination had been made in The Tax Court of the United States. This action will follow a denial of the injunction notwithstanding that plaintiff's petitions for redetermination of profits for the years 1942 and 1943 are now pending in The Tax Court of the United States.

The complaint alleged, and the motion to dismiss admitted, that plaintiff was in the business of manufacturing Diesel fuel injection equipment, and precision parts for aircraft, upon customers' specifications, and that plaintiff sold the articles so manufactured by it to various contractors and subcontractors who in turn furnished aircraft or completed engines to the War Department. It was then alleged that the Secretary of War, acting through his delegate the Under Secretary of War, had made a "unilateral determination" on October 27, 1943, that plaintiff had realized excessive profits of $775,000 on its total business of $2,706,477.33 during the fiscal year ended November 30, 1942; that plaintiff had declined to acquiesce in such determination and on May 18, 1944 had filed the Petition

for Redetermination of Profits in The Tax Court of the United States; that in July, 1944, notwithstanding said petition was then, as it is now, still pending in The Tax Court of the United States, the Under Secretary of War directed customers of the plaintiff (not the United States of America or any agency or department thereof), to pay into the Treasury of the United States the sum of $204,000 (that sum representing $775,000 of excessive profits less appropriate tax adjustments), and that such sum of $204,000 was paid into the Treasury of the United States by such customers pursuant to said order.

The complaint also alleged that of the total business of $2,706,477.33 for the fiscal year 1942 (December 1, 1941 to November 30, 1942), eighty per cent (80%) thereof was done on contracts made *prior* to April 28, 1942 (the date of the First Act); that if the writings between plaintiff and its customers did not constitute "master" or over-all contracts, plaintiff had shipped pursuant to "shipping orders" issued prior to April 28, 1942, $1,625,023.65 of the total year's business. The complaint alleged that notwithstanding this fact and other facts bearing upon the unreasonableness of the amount of the determination, the "unilateral determination" had been made and the amount of $204,000 collected from plaintiff's customers while plaintiff's petition for redetermination was pending in The Tax Court of the United States.

The complaint then alleged that following the completion of its fiscal year 1943 (November 30, 1943), plaintiff filed its report with the War Contracts Price Adjustment Board at Chicago, Illinois (asserting the invalidity of the Renegotiation Act), but showing sales of $3,548,845.50, profit *before* Federal taxes of $1,393,470.36, the payment of $991,340.37 of taxes, and a net profit of $402,129.99, or 11.33% of its sales; that on January 11, 1945, the Under Secretary

of War made another unilateral determination, as delegate of the War Contracts Price Adjustment Board, designated an "Order under Delegated Authority," that plaintiff had realized excessive profits of $1,265,000 and directing the elimination of this sum, after tax adjustments. The complaint alleged that plaintiff again filed its Petition for Redetermination in The Tax Court of the United States, where it is still pending. The complaint also alleged that of the total sales of $3,548,845.50 eighty per cent (80%) was shipped pursuant to contracts made before April 28, 1942; that all of said shipments were made before February 25, 1944 (the date of the Second Act), and that in any event $175,423.71 of the total sales were made upon shipping orders issued prior to April 28, 1942.

The complaint also alleged that unless the interlocutory injunction were issued the defendants would direct payment by the customers, as in prior years, to the Treasury of the United States, and plaintiff would sustain irreparable injury in that plaintiff would be compelled to unnecessarily run the risk of subsequently impaired credit or insolvency of its customers; would sustain a great impairment of its working capital; would be required to sue its several customers and incur their ill-will or to refuse to do further work for them. The complaint alleged further that there was no plain, adequate and complete remedy at law because (a) the legal effect of the threatened order was to take plaintiff's property without just compensation and without due process of law; (b) the remedy in The Tax Court of the United States was inadequate because, pending a determination of the questions in The Tax Court of the United States (assuming The Tax Court of the United States can pass upon the constitutionality of the Act), plaintiff's property would be taken as it had been in the prior year; (c) that a remedy, if any, in the Court of Claims is uncertain

and indefinite; (d) that the plaintiff would be required, at great expense, to bring a number of suits at law in different jurisdiction to compel its customers to pay the money owed to it by such customers and that such multiplicity of suits would be onerous to its customers in compelling them to defend suits which involved questions of law of public importance; (e) that plaintiff's officers would be required to be absent from its plant for long periods of time; and (f) that plaintiff would be required in such suits to establish which contracts were found to be productive of excessive profits since the War Contracts Price Adjustment Board had determined excessive profits on a lump sum basis rather than upon individual contracts.

This case was heard below by a Three-Judge Court constituted under the Act of August 24, 1937, 50 Stat. 751, Section 3, 28 U. S. C. A. 380(a).

The order entered March 5, 1946, denies the motion of the plaintiff for an interlocutory injunction, dismisses the complaint and enters a summary judgment for the defendants.

V.

Rulings of the Court Below Which Were Such as to Bring the Case Within the Jurisdictional Provisions Relied upon.

By the complaint and by the motion of the plaintiff, plaintiff sought an interlocutory and permanent injunction, suspending and restraining the enforcement, operation and execution of the Renegotiation Act; and particularly parts of said Act, upon the ground that such Act and particularly Sections 403 (c) (2) and 403 (e) (1) are repugnant to Article I, Section 1; Article III, Sections 1 and 2 of the Constitution of the United States, and to the Fifth, Seventh and Tenth Amendments thereto.

The plaintiff also sought a declaratory judgment that the Act was unconstitutional.

The defendants filed a motion to dismiss the complaint, and for summary judgment in favor of the defendants.

The order of the Court entered March 5, 1946, denied the motion for an interlocutory injunction and for a declaratory judgment and dismissed the complaint, and entered a summary judgment in favor of the defendants. The provisions of the statute, Title 28, Section 380(a), U. S. C. A., under which the Court acted, provide as follows:

> "An appeal may be taken directly to the Supreme Court of the United States upon application therefor or notice thereof within thirty days after the entry of the order, decree, or judgment granting or denying, after notice and hearing, an interlocutory or permanent injunction in such case."

The jurisdiction of the Court was recognized in the case of *Mines Appliance Company* v. *Forrestal*, — U. S. —, No. 71, October Term, 1945, in respect of the First Act questioned here.

Jurisdiction was also recognized based upon similar rulings of the Court in the case of *Coffman* v. *Breeze*, 328 U. S. 316, which relates to a similar proceeding in respect of a very similar Act, the Royalty Adjustment Act.

VI

Grounds upon Which It Is Contended That the Questions Involved Are Substantial

As construed, both Acts authorize an administrative agency to determine the amount of money due to the United States from a citizen, upon whatever information the agency chooses to act, whether that information be known or un-

known to the citizen, and to then collect the amount so determined, by taking the citizen's property without any form of a judicial proceeding, and after such taking of the property, grant a right to a redetermination by a second administrative agency to the complete exclusion of a hearing in a constitutionally organized court.

In our opinion, such statutes violate the provisions of the Constitution of the United States and particularly Article I, Section 1; Article III, Sections 1 and 2; Amendments V, VII and X.

(A)

IT IS BELIEVED THAT THE STATUTES PURPORTED TO DELEGATE LEGISLATIVE FUNCTIONS TO APPOINTED EXECUTIVES AND ADMINISTRATIVE OFFICIALS WITHOUT ANY SUFFICIENT STANDARDS TO GUIDE THEM, AND IN SO DOING VIOLATE THE PROVISIONS OF ARTICLE I, SECTION 1, OF THE CONSTITUTION OF THE UNITED STATES, WHICH PROVIDES THAT ALL LEGISLATIVE POWERS SHALL BE VESTED IN A CONGRESS OF THE UNITED STATES.

The First Act contained no standards or guides for the determination of the amount of excessive profits. Excessive profits was there, Section 403 (A) (4), defined as:

> "The term 'excessive profits' means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits."

Under this Act, the authority of the Secretary (where no agreement was reached) was unlimited, and as shown by his order of October 27, 1943, in determining the amount of alleged excessive profits for the year 1942, he considered "certain financial, operating and other data submitted by the contractor or obtained by the Under Secretary of War from governmental or other reliable sources relative to the profits realized by the contractor."

In our opinion, the absence of *any* standards or requirements in the Act for the guidance of the agency, rendered the Act void under the decisions of this Court.

Schechter v. *United States*, 295 U. S. 495;
Yakus v. *United States*, 321 U. S. 415;
Panama Ref. Co. v. *Ryan*, 293 U. S. 388;
Carter v. *Carter Coal Co.*, 298 U. S. 238;
United States v. *Cohen*, 255 U. S. 81.

The Second Act defined the term "excessive profits" as follows (Section 403(a)(4)(A)):

> "(4)(A) The term 'excessive profits' means the portion of the profits derived from contracts with the Departments and subcontracts which is determined in accordance with this section to be excessive. In determining excessive profits there shall be taken into consideration the following factors:
>
> "(i) efficiency of contractor, with particular regard to attainment of quantity and quality production, reduction of costs and economy in the use of materials, facilities, and manpower;
>
> "(ii) reasonableness of costs and profits, with particular regard to volume of production, normal pre-war earnings, and comparison of war and peacetime products;
>
> "(iii) amount and source of public and private capital employed and net worth;
>
> "(iv) extent of risk assumed, including the risk incident to reasonable pricing policies;
>
> "(v) nature and extent of contribution to the war effort, including inventive and developmental contribution and cooperation with the Government and other contractors in supplying technical assistance;
>
> "(vi) character of business, including complexity of manufacturing technique, character and extent of subcontracting, and rate of turn-over;

"(vii) such other factors the consideration of which the public interest and fair and equitable dealing may require, which factors shall be published in the regulations of the Board from time to time as adopted."

As shown by the order of the Under Secretary of War, dated January 11, 1945, determining excessive profits for the year 1943 (which order became the order of the War Contracts Price Adjustment Board), these factors also permitted the Secretary to consider, and he did so consider, "certain financial, operating, and other data obtained from governmental or other reliable sources."

In our opinion, the "factors" recited in the Second Act are so vague and indefinite that the Act is void, under the decisions of this Court, cited above.

(B)

IT IS BELIEVED THAT THE STATUTES PURPORT TO DELEGATE JUDICIAL FUNCTIONS TO ADMINISTRATIVE OFFICIALS, AND IN SO DOING VIOLATE THE PROVISIONS OF ARTICLE III, SECTIONS 1 AND 2, OF THE CONSTITUTION OF THE UNITED STATES

Sections 1 and 2 of Article III of the Constitution provide as follows:

"The Judicial power of the United States shall be vested in one supreme court and in such inferior courts as Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts shall hold their offices during good behavior, and shall at stated times receive for their services a compensation which will not be diminished during their continuance in office.

"Section 2. The judicial power shall extend to all cases in law and equity arising under this constitution, and the laws of the United States and treaties made or which shall be made under public authority, to all cases affecting ambassadors, other public ministers and consuls, to all cases in admiralty and maritime

jurisdiction, *to controversies to which the United States shall be a party.*" (Italics ours.)

The First Act contains *no* provision whatsoever for a review of the determination of excessive profits as made by the Secretary or his delegates.

The Second Act purports to grant a redetermination of the determination made by the War Contracts Price Adjustment Board, in The Tax Court of the United States, and then provides that such determination of The Tax Court "shall be final and conclusive and shall not be subject to review or redetermination by any other court or agency." (Section 403(c)(1.)

The Tax Court of the United States, however, is not a court but an agency of the Executive Branch of the Government. (Section 1100, Chapter 5, Title 26, U. S. C. A. 1944 Pamphlet, p. 112, and *Hutching-Bealy National Bank* v. *Com. of Int. Revenue*, 141 Fed. (2d) 422.)

In our opinion the attempt to vest judicial functions in a non-judicial body over "controversies to which the United States shall be a party", renders the Second Act void, and the absence of any judicial review in the First Act renders the First Act void.

Murray's Lessee v. *Hoboken Land*, 18 How. 272;
Gordon v. *United States*, 117 U. S. 697;
Sinking Fund Cases, 99 U. S. 700;
United States v. *Lee*, 106 U. S. 196.

(C)

IT IS BELIEVED THAT BOTH ACTS PURPORT TO DEPRIVE A PERSON OF PROPERTY WITHOUT DUE PROCESS OF LAW.

The Fifth Amendment to the Constitution provides in part as follows:

"No person shall be deprived of life, liberty or property without due process of law."

The First Act provide for no review whatsoever, and only that the contractor may be given notice for an initial conference. If no agreement was reached between the contractor and the Secretary, the Secretary's subsequent determination was final.

The Second Act provides that if no agreement be reached, the War Contracts Price Adjustment Board shall enter an order determining the amount, and if no petition be filed in The Tax Court of the United States such order shall be final and conclusive. (Section 403(c).) If, however, a petition for redetermination is filed in The Tax Court of the United States "it shall not operate to stay the execution of the Board." (Section 403(e).) As plaintiff has experienced, the filing of a petition for redetermination in The Tax Court of the United States does not prevent the taking of its property. Under the Second Act the plaintiff has only the sterile right to file a petition in The Tax Court of the United States and watch its property be taken.

In our opinion, neither the Second Act nor the First Act afford due process of law under the decisions of this Court, or under the accepted American doctrine that "due process" while varying in its requirements, always embodies that procedure commonly described as "fair play".

Porter v. *Investors Syndicate,* 286 U. S. 461;
Pacific Tel. Co. v. *Kuykendall,* 265 U. S. 196;
Morgan v. *United States,* 298 U. S. 468;
Morgan v. *United States,* 304 U. S. 15;
Railroad Com. v. *Pac. Gas & Electric Co.,* 302 U. S. 388.

In each instance the order of the Secretary or of the War Contracts Price Adjustment Board was entered "upon data furnished by the contractor" or "obtained from governmental or other reliable sources", but such last mentioned data was not known to the contractor.

In our opinion, such procedure was in itself a denial of due process under the ruling of this Court made upon an order containing a similar recital.

Ohio Bell Tel. Co. v. *Public Utilities Com.*, 301 U. S. 292, page 296.

(D)

IT IS BELIEVED THAT BOTH ACTS PURPORT TO TAKE PRIVATE PROPERTY FOR PUBLIC USE, WITHOUT JUST COMPENSATION, IN VIOLATION OF THE FIFTH AMENDMENT.

That plaintiff's property, $204,000, was taken under the First Act, as excessive profits for the year 1942, and is now in the Treasury of the United States, is not denied. That there is to be no return of that sum, unless this Court shall so direct, is also undenied.

That defendants propose to take $275,000 more, as excessive profits for the year 1943, is not denied; in fact, it is asserted by the affidavits filed. That such sum will not be returned, unless this Court shall so direct, is also admitted.

The existence of war or emergency vested in Congress no power to violate the provisions of the Constitution.

Schechter v. *United States*, 295 U. S. 495-528;
United States v. *Cohen*, 255 U. S. 81-88.

The taking of plaintiff's property and the proposed taking, under the circumstances herein set forth, is, in our opinion, in direct contradiction to the decisions of this Court.

International Paper Co. v. *United States*, 282 U. S. 399;
Brooks Scanlon Corp. v. *United States*, 265 U. S. 106;
Lynch v. *United States*, 292 U. S. 571.

Even if the right to take property for public use be recognized, the ascertainment of just compensation has always been recognized as a judicial function.

United States v. *New River Collieries*, 262 U. S. 341;
Davis v. *Newton Coal Co.*, 267 U. S. 292.

The Renegotiation Act, while not purporting to authorize the taking of plaintiff's plant, its inventory, its machines or tools, does just as completely authorize the taking of plaintiff's property, that is, the money due it from its customers, for materials sold to such customers. The Act purports to deny to the plaintiff a right to have any judicial determination of the validity of such taking or of the value of the thing taken, and in so doing is repugnant to the Constitution of the United States. (*Waugh* v. *Standard Chemicals*, 221 N. Y. 51, 131 N. E. 566.)

(E)

IT IS BELIEVED THAT BOTH ACTS ARE IN VIOLATION OF ARTICLE VII OF THE CONSTITUTION OF THE UNITED STATES.

Article VII provides that in suits at common law, when the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved.

These Acts purport to allow an administrative agency to assert a claim for money in excess of $20.00 against a citizen, which claim is not one for taxes, determine that claim in the agency's own manner, and to then deny to the citizen his right to a trial by a jury.

In our opinion the right to a trial by jury is still one of the safeguards of the individual and cannot be legislated away.

Galloway v. *United States*, 319 U. S. 372, and cases there cited;
Van Horn's Lessee v. *Dorrance*, 2 Dall, 303.

(F)

IT IS BELIEVED THAT IN ITS RETROACTIVE PROVISIONS, AND THE DEFENDANTS' ACTION THERETO, THE STATUTES ARE UNCONSTITUTIONAL UNDER THE RULINGS OF THE COURT IN CHICAGO & NORTHWESTERN RY. CO. v. UNITED STATES, 104 U. S. 680; LYNCH v. UNITED STATES, 292 U. S. 571; UNITED STATES v. BETHLEHEM SHIPBUILDING CORPORATION, 315 U. S. 289.

(a) The Second Act was enacted February 25, 1944. It purports by its terms (Section 403 (C) (6)) "to apply to all contracts and subcontracts to the extent of amounts received or accrued thereunder in any fiscal year ending after June 30, 1943, whether such contracts or subcontracts were made on, prior to, or after the date of the enactment of the Revenue Act of 1943." Plaintiff's fiscal year ended November 30, 1943. All sales for that year were completed two months before the Revenue Act of 1943 was enacted.

(b) The First Act was enacted April 28, 1942. It purports by its terms (Section 403 (d) (6)) to apply "to all contracts and subcontracts hereafter made, and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause unless final payment pursuant to such contracts or subcontracts was made prior to April 28, 1942."

In the Amended Complaint, plaintiff asserted that of the total sales in 1943 of $3,548,845.50 ($3,519,825 deemed subject to renegotiation), a total of $2,780,000.82 were upon contracts made *prior* to April 28, 1942 with six customers. Plaintiff further asserted that of its total sales in 1942 of $2,706,477.33 ($2,448,000 deemed subject to renegotiation), a total of $1,886,770.11 was made upon contracts made *prior* to April 28, 1942.

In the determinations of the agencies for the fiscal years 1942 and 1943, those sales upon contracts made prior to April 28, 1942 were *included* as being subject to renegotiation, regardless of the date of the contract.

In the District Court defendants asserted in their briefs that plaintiff did not have master contracts, but rather individual contracts in the form of purchase orders. For the year 1943, as alleged in the complaint, $175,423.71 of sales were made upon purchase orders prior to April 28, 1942, and for the year 1942, $1,625,023.65 of sales were made upon the so-called "short term contracts or purchase orders made prior to April 28, 1942."

In both years, 1942 and 1943, the agencies included such sales made upon purchase orders prior to April 28, 1942.

It is believed that whether plaintiff had master or over-all contracts dated prior to April 28, 1942, or individual contracts predicated upon shipping orders dated prior to April 28, 1942 (which question some court should ultimately pass upon), there can be no question but that the *inclusion* of such sales, on contracts or on orders made prior to April 28, 1942, was improper and that the statute purporting to give such right (if it be subject to such construction) was unconstitutional.

It is respectfully submitted that the questions here involved are most substantial and of the greatest importance. The legislation is new and unusual. It deprives the citizen of his property without any form of judicial sanction. It places the individual at the complete mercy of an individual governmental agency. It requires and affords no uniformity of action. It is not a taxing statute, and yet purports to authorize collection of the amount determined to be excessive in a manner not sanctioned by a tax statute. It deprives the citizen of a trial by a jury in a suit between his government and himself. It is the means of the destruction of a business without any redress if an error had been made. It justifies the repudiation by the government of its contracts, and grants to an administrative agency the power to rewrite private contracts.

These are substantial questions of grave public importance and it is respectfully suggested that the importance of this legislation deserves and should receive the early consideration of the Supreme Court of the United States.

VII

The Opinion of the Court upon the Decree Sought to Be Reviewed

There is attached hereto, marked Exhibit "C", a copy of the opinion delivered upon the rendering of the decree sought to be reviewed. There are no earlier opinions in this case.

VIII

The Court Erred in the Entry of Its Order of March 5, 1946, Denying the Interlocutory Injunction and Dismissing the Complaint.

The order of the Court entered March 5, 1946, denied the motions of the plaintiff for an interlocutory injunction and for a declaratory judgment. In addition, the same order dismissed the complaint and entered summary judgment for the defendants.

During July, 1944, the Under Secretary of War directed customers of the plaintiff to pay into the Treasury of the United States the sum of $204,000, representing the determination of the Under Secretary as to the amount of excessive profits (after tax adjustments) realized by the contractor during the year ended November 30, 1942, and the amount of $204,000 was so paid pursuant to said order. The action of the Under Secretary was taken after plaintiff's Petition for Redetermination of Profits for 1942 was filed in The Tax Court of the United States.

After the "Order under Delegated Authority", determining excessive profits for the year 1943, dated January 11, 1945, was received, plaintiff filed its Petition for Redetermination of Profits in The Tax Court of the United States for the year 1943. Both the 1942 and the 1943 petitions are still pending in The Tax Court. Both petitions assert the invalidity of the Act under which the respective determinations were made, and both petitions assert that even if the Acts under which the respective determinations were made are valid, such Acts have been improperly applied to plaintiff's operations.

After receiving the order of January 11, 1945, plaintiff anticipated that the defendants would do, as they had done in the prior year, namely, direct customers to pay approximately $275,000 into the Treasury of the United States, before there was any judicial determination of the validity of the Act, and before The Tax Court of the United States would pass upon the Petition for Redetermination of Profits for 1943. That the defendants proposed to take this action is admitted by the defendants in their affidavits.

It is respectfully contended that in view of the situation existing, the Court was in error in the entry of its order of March 5, 1946, for the following reasons:

(a) Substantial doubt exists as to the validity of both of the Acts, and neither has as yet been approved by the Supreme Court of the United States as a valid exercise of the powers of the Federal Government. If both Acts are determined to be invalid, then the action taken for the year 1942, and the action proposed to be taken for the year 1943, is in each instance illegal. If the First Act only is invalid, plaintiff has already been deprived of $204,000 which might well be set off against any subsequent accruing claim under the Second Act. The District Court did not pass upon the constitutionality of either Act, but placed its decision upon

the ground that the suit was premature and that plaintiff had adequate remedies at law. Until both Acts have been determined to be valid, action as drastic as is proposed to be taken should, in our opinion, have been enjoined in order that the questions might be passed upon by the Court without inflicting unnecessary hardship upon the plaintiff. It was so held by a District Court in the case of *Lincoln Electric Co.* v. *Knox,* 56 Fed. Supp. 308.

(b) The issuance of an interlocutory injunction would not have injured the defendants or the United States of America, since adequate bond for the payment of any amount alleged to be due would have been required, whereas the denial of the injunction permits plaintiff to be deprived of $275,000 of needed working capital, in addition to the $204,000 already taken, without means of recovery for the injury it must sustain if the taking be found to be illegal in whole or in part. If the doctrine of the balancing of conveniences discussed in *Petroleum Co.* v. *Com.*, 304 U .S. 209, is operative, the case of the plaintiff is so strong that a denial of the issuance of an injunction must be an abuse of discretion, and the dismissing of the complaint be error.

(c) The District Court erroneously assumed that the suit was premature.

I

The Suggested Remedy in the Tax Court

In the opinion reference is made to the fact that plaintiff has filed its petition in The Tax Court of the United States, and to the possibility that The Tax Court of the United States may find that plaintiff realized no excessive profits.

It is then asserted that if The Tax Court of the United States should so hold, the constitutionality of the Act is immaterial, and for that reason the suit is premature, until

the administrative remedy has been exhausted. In support of this statement, the Court cites *Arrow Distilleries, Inc.*, v. *Alexander*, 24 Fed. Supp. 880, affirmed 306 U. S. 615. We do not believe the decision, or the rule, applicable here.

It is perhaps true that every effort should be made, in most situations, to exhaust the administrative remedy before seeking injunctive relief. This the plaintiff did by the filing of its petitions for redetermination for the years 1942 and 1943 in The Tax Court of the United States. It does not follow, however, that plaintiff has no right to injunctive relief when, while awaiting action of the administrative reviewing agency, the property of the plaintiff will be taken from the plaintiff. *Porter* v. *Investors Syndicate*, 285 U. S. 461. The Supreme Court has held that an injunction may issue notwithstanding no effort has been made to obtain relief through administrative agencies. *United States* v. *Abilene & No. Ry. Co.*, 265 U. S. 274.

If plaintiff be required to await action of The Tax Court of the United States, then the so-called "administrative remedy" is no remedy at all, but rather a deterrent to the procedure ordinarily applicable if the suit were between individuals.

It is extremely doubtful whether The Tax Court of the United States has the jurisdiction to pass upon the constitutionality of the Acts. It is even more doubtful whether, if such jurisdiction exists, it will be exercised by The Tax Court of the United States. It would appear, therefore, that the remedy in The Tax Court is not equal to the one which a Federal equity court could afford.

It is respectfully asserted that where the so-called "administrative remedy" is not adequate to protect the individual or his property, either because it lacks jurisdiction to pass upon the questions presented, or because it cannot act with sufficient speed to protect the individual or his prop-

erty, that a Federal court of equity will not require the administrative remedy to be exhausted before furnishing the means of preventing the threatened injury. This is particularly true when the other party will not sustain an injury by such procedure.

2

The Suggested Remedy in the Court of Claims

It is next asserted "that as to any liability on the United States, its (plaintiff's) remedy is in the Court of Claims." Unlike the Royalty Adjustment Act, which was before the court in *Coffman* v. *Breeze*, 323 U. S. 316, plaintiff has no right in the Court of Claims. A careful reading of the Renegotiation Act fails to disclose any reference to the Court of Claims. Even if it be assumed that as to the payments made into the Treasury, plaintiff has some right of recovery outside the language of the Renegotiation Act, it follows that such remedy is neither "as complete, practical and efficient as that which equity could afford." (*Terrance* v. *Thompson*, 263 U. S. 197.)

Under any circumstances, plaintiff's possible recovery in the Court of Claims is neither as complete, practical or efficient as the equity could afford. Even assuming jurisdiction of the Court of Claims, and assuming the Acts be each declared unconstitutional in a proceeding against a customer, repayment of the amounts collected could not reasonably be expected in three years. This suggested "adequate remedy" can hardly be said to be as "complete, practical and efficient" as could be afforded in an equity court in a single proceeding where all questions are before the Court and could be determined in a single proceeding.

3

The Suggested Remedy by Actions at Law Against the Several Debtors

In the opinion of the Court, it is aserted that "plaintiff's debtors are not numerous", and that "there is no reason why the plaintiff has not a complete and adequate remedy by suit against its customers for any sums that may be due from them if the Act be unconstitutional."

While it is not known what the Court meant by the statement that "plaintiff's debtors are not numerous", it does appear from the affidavits filed that to recover $275,000 plaintiff would be required to sue twenty (20) or more of its customers.

It must be apparent, also, that such suits cannot be as "complete, practical and efficient" as this proceeding. The customers are in different cities and states. Attorneys must be employed in each of those cities where suits are instituted. Plaintiff's officials must be ready to appear in those cities, to the disadvantage of the plaintiff corporation in the conduct of its business. Plaintiff's customers will not regard favorably a suit against them involving a matter in which they are not primarily interested, and in which they are nominal parties only, and these defendants the real parties. Plaintiff will by such procedure lose the good will it has created and maintained. Delays, expense, interference with business, and with customer relations, confusion and uncertainty can only result from the procedure suggested by the District Court. The granting of the interlocutory injunction and a hearing upon the merits would afford a prompt determination of the questions of public interest, between the actual interested parties, in a much less expensive procedure and without unnecessary inter-

ference with plaintiff's business or the duties of its officers. *Harrisonville* v. *Dickey Clay Co.*, 289 U. S. 334; *Pierce* v. *Society of Sisters*, 268 U. S. 510; *Raich* v. *Truax*, 239 U. S. 33; *Columbia System* v. *Federal Communications*, 316 U. S. 407.

In the opinion of the District Court reference is made to *Coffman* v. *Breeze*, 323 U. S. 316, as supporting the contention that the law affords a complete and legal remedy in the present case. We do not so understand that opinion. In that case the plaintiff had only two customers who might be sued; the defendant answered that no royalties were due, and the validity of the Act was therefore immaterial. In addition, the Royalty Adjustment Act gives to the aggrieved party the right to institute suits against the United States, in the Court of Claims or in the District Courts, a provision not appearing in the Renegotiation Act.

In the instant case the complaint (Par. 44) alleged that the denial of the injunction would result in irreparable injury to the plaintiff, in that it would (a) compel plaintiff to unnecessarily run the risk of the subsequently impaired credit or the insolvency of the several debtors; (b) impair plaintiff's working capital; (c) force plaintiff to select one of two courses, continue to ship to customers who withheld payments, with the impairment of plaintiff's capital, or refuse to make shipments and discontinue business; and (d) force plaintiff to sue its customers with the resultant ill feeling and loss of good will.

In the complaint (par. 45), it is further alleged that plaintiff is without a plain and adequate remedy at law, because (a) the ordering of payment is the taking of plaintiff's property without compensation and without providing any legal remedy to recover the same; (b) the right of redetermination of amount in The Tax Court affords no means

of recovery of the amounts paid; (c) the case may not be within the jurisdiction of the Court of Claims, and no recovery of interest could be had; (d) the multiplicity of suits required in various jurisdictions, with the attendant costs and delays; and (e) the loss of good will.

It is most respectfully contended that the suggestion of the District Court that an adequate remedy at law exists, is as unlegalistic as it is unrealistic.

It is further suggested in the opinion that plaintiff should not complain of any defects in the hearings before the War Contracts Price Adjustment Board, since plaintiff is assured of a full hearing before The Tax Court, and in support of that suggestion there is cited *National Labor Relations Board* v. *Mackey Radio Co.*, 304 U. S. 333. In this assertion the District Court has overlooked the fact that in the case cited the defect in administrative procedure did not result in the taking of property without compensation, without due process and without a remedy for its recovery. The District Court also overlooked the fact that the full hearing in The Tax Court of the United States is only a hearing before a second administrative body, a branch of the Executive Department of the Government and not a proper substitute for a constitutional court empowered to determine questions of constitutional law as presented here. The District Court also overlooked the fact that the "full hearing in The Tax Court of the United States" affords nothing except an academic review, since long before its determination is made, plaintiff's property is taken, and no means of recovery are afforded.

It is respectfully asserted that the District Court erred in denying the interlocutory injunction and in dismissing the complaint. It is also respectfully contended that the importance of the legislation involved, the serious doubt

of its validity, the situation as applied to plaintiff justified the issuance of the interlocutory injunction, and a subsequent determination of the issues on the merits.

Respectfully submitted,

GALLAGHER, RINAKER, WILKINSON & HALL,
(S.) ARTHUR R. HALL,
Attorneys for Plaintiff.

EXHIBIT "A"

Renegotiation Act of 1942

(Applicable to Fiscal Years Ending Before July 1, 1943)

RENEGOTIATION ACT OF 1942. Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942 (Public 528, 77th Congress), approved April 28, 1942, as amended by Section 801 of the Revenue Act of 1942 (Public 753, 77th Congress), approved October 21, 1942; by the Military Appropriation Act, 1944 (Public 108, 78th Congress), approved July 1, 1943; and by Public 149, 78th Congress, approved July 14, 1943.

Sec. 403 (a). For the purposes of this section—

(1) The term "Department" means the War Department, the Navy Department, the Treasury Department, the Maritime Commission, Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, respectively.

(2) In the case of the Maritime Commission, the term "Secretary" means the Chairman of such Commission, and in the case of Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, the term "Secretary" means the board of directors of the appropriate corporation.

(3) The terms "renegotiate" and "renegotiation" include the refixing by the Secretary of the Department of the contract price.

(4) The term "excessive profits" means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits.

(5) The term "subcontract" means

(i) any purchase order or agreement to perform all or any part of the work, or to make or furnish any article, required for the performance of any other contract or subcontract, or

(ii) any contract or arrangement (other than a contract or arrangement between two contracting parties, one of which parties is found by the Secretary to be a bona fide executive officer, partner, or full-time employee of the other contracting party),

(A) any amount payable under which is contingent upon the procurement of a contract or contracts with a Department or of a subcontract or subcontracts thereunder, or determined with reference to the amount of such a contract or subcontract or such contracts or subcontracts, or

(B) under which any part of the services performed or to be performed consists of the soliciting, attempting to procure, or procuring a contract or contracts with a Department or a subcontract or subcontracts thereunder:

Provided, That nothing in this sentence shall be construed (1) to affect in any way the validity or construction of provisions in any contract with a Department or any subcontract thereunder heretofore at any time or hereafter made, prohibiting the payment of contingent fees or commissions; or (2) to restrict in any way the authority of the Secretary to determine the nature or amount of selling expenses under subcontracts as defined in (ii) herein, as a proper element of the contract price or as a reimbursable item of cost, under a contract with a Department or a subcontract thereunder. The term "article" includes any material, part, assembly, machinery, equipment, or other personal property.

For the purposes of subsections (d) and (e) of this section, the term "contract" includes a subcontract and the term "contractor" includes a subcontractor.

Sec. 403(b). Subject to subsection (i), the Secretary of each Department is authorized and directed to insert in any contract for an amount in excess of $100,000 hereafter made by such Department—

(1) a provision for the renegotiation of the contract price at a period or periods when, in the judgment of the

Secretary, the profits can be determined with reasonable certainty;

(2) a provision for the retention by the United States from amounts otherwise due the contractor, or for the repayment by him to the United States, if paid to him, of any excessive profits not eliminated through reductions in the contract price, or otherwise, as the Secretary may direct;

(3) a provision requiring the contractor to insert in each subcontract described in subsection (a)(5)(ii) and in each subcontract for an amount in excess of $100,000 described in subsection (a)(5)(i) made by him under such contract

(i) a provision for the renegotiation by such Secretary and the subcontractor of the contract price of the subcontract at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty.

(ii) a provision for the retention by the contractor for the United States of the amount of any reduction in the contract price of any subcontract pursuant to its renegotiation hereunder, or for the repayment by the subcontractor to the United States of any excessive profits from such subcontract paid to him and not eliminated through reductions in the contract price or otherwise, as the Secretary may direct, and

(iii) a provision for relieving the contractor from any liability to the subcontractor on account of any amount so retained by the contractor or repaid by the subcontractor to the United States, and

(iv) in the discretion of the Secretary, a provision requiring any subcontractor to insert in any subcontract made by him under such subcontract, provisions corresponding to those of subparagraphs (3) and (4) of this subsection (b); and

(4) a provision for the retention by the United States from amounts otherwise due the contractor, or for repay-

ment by him to the United States, as the Secretary may direct, of the amount of any reduction in the contract price of any subcontract under such contract, which the contractor is directed, pursuant to clause (3) of this subsection, to withhold from payments otherwise due the subcontractor and actually unpaid at the time the contractor receives such direction.

The provision for the renegotiation of the contract price, in the discretion of the Secretary,

(i) may fix the period or periods when or within which renegotiation shall be had; and

(ii) if in the opinion of the Secretary the provisions of the contract or subcontract are otherwise adequate to prevent excessive profits, may provide that renegotiation shall apply only to a portion of the contract or subcontract or shall not apply to performance during a specified period or periods and may also provide that the contract price in effect during any such period or periods shall not be subject to renegotiation.

Section 403(c). (1) Whenever, in the opinion of the Secretary of a Department, the profits realized or likely to be realized from any contract with such Department, or from any subcontract thereunder whether or not made by the contractor, may be excessive, the Secretary is authorized and directed to require the contractor or subcontractor to renegotiate the contract price. When the contractor or subcontractor holds two or more contracts or subcontracts the Secretary, in his discretion, may renegotiate to eliminate excessive profits on some or all of such contracts and subcontracts as a group without separately renegotiating the contract price of each contract or subcontract.

(2) Upon renegotiation, the Secretary is authorized and directed to eliminate any excessive profits under such contract or subcontract

(i) by reductions in the contract price of the contract or subcontract or by other revision in its terms; or

(ii) by withholding, from amounts otherwise due to the contractor or subcontractor, any amount of such excessive profits; or

(iii) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to the subcontractor, any amount of such excessive profits under the subcontract; or

(iv) by recovery from the contractor or subcontractor, through repayment, credit or suit, of any amount of such excessive profits actually paid to him; or

(v) by any combination of these methods, as the Secretary deems desirable. The Secretary may bring actions on behalf of the United States in the appropriate courts of the United States to recover from such contractor or subcontractor, any amount of such excessive profits actually paid to him and not withheld or eliminated by some other method under this subsection. The surety under a contract or subcontract shall not be liable for the repayment of any excessive profits thereon. All money recovered by way of repayment or suit under this subsection shall be covered into the Treasury as miscellaneous receipts.

(3) In determining the excessiveness of profits realized or likely to be realized from any contract or subcontract, the Secretary shall recognize the properly applicable exclusions and deductions of the character which the contractor or subcontractor is allowed under Chapter 1 and Chapter 2E of the Internal Revenue Code. In determining the amount of any excessive profits to be eliminated hereunder the Secretary shall allow the contractor or subcontractor credit for Federal income and excess profits taxes as provided in Section 3806 of the Internal Revenue Code.

(4) Upon renegotiation pursuant to this section, the Secretary may make such final or other agreements with a contractor or subcontractor for the elimination of excessive profits and for the discharge of any liability for excessive profits under this section, as the Secretary deems desirable. Such agreements may cover such past and future period or periods, may apply to such contract or contracts of the contractor or subcontractor, and may contain such terms and conditions, as the Secretary deems advisable. Any such

agreement shall be final and conclusive according to its terms; and except upon a showing of fraud or malfeasance or a wilful misrepresentation of a material fact,

(i) such agreement shall not be reopened as to matters agreed upon, and shall not be modified by any officer, employee, or agent of the United States; and

(ii) such agreement and any determination made in accordance therewith shall not be annulled, modified, set aside, or disregarded in any suit, action, or proceeding.

(5) Any contractor or subcontractor who holds contracts or subcontracts, to which the provisions of this section are applicable, may file with the Secretaries of all the Departments concerned statements of actual costs of production and such other financial statements for any prior fiscal year or years of such contractor or subcontractor, in such form and detail, as the Secretaries shall prescribe by joint regulation. Within one year after the filing of such statements, or within such shorter period as may be prescribed by such joint regulation, the Secretary of a Department may give the contractor or subcontractor written notice, in form and manner to be prescribed in such joint regulation, that the Secretary is of the opinion that the profits realized from some or all of such contracts or subcontracts may be excessive, and fixing a date and place for an initial conference to be held within sixty days thereafter. If such notice is not given and renegotiation commenced by the Secretary within such sixty days the contractor or subcontractor shall not thereafter be required to renegotiate to eliminate excessive profits realized from any such contract or subcontract during such fiscal year or years and any liabilities of the contractor or subcontractor for excessive profits realized during such period shall be thereby discharged.

(6) This subsection (c) shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such

contracts or subcontracts contain a renegotiation or recapture clause, unless

(i) final payment pursuant to such contract or subcontract was made prior to April 28, 1942; or

(ii) the contract or subcontract provides otherwise pursuant to subsection (b) or (i), or is exempted under subsection (i) of this section 403; or

(iii) the aggregate sales by and amounts payable to the contractor or subcontractor and all persons under the control of or controlling or under common control with the contractor or subcontractor, under contracts with the Departments and subcontracts thereunder (including those described in clauses (i) and (ii) of this subsection (6), but excluding subcontracts described in subsection (a) (5) (ii) do not exceed, or in the opinion of the Secretary will not exceed, $100,000, and under subcontracts described in subsection (a) (5) (ii) do not exceed, or in the opinion of the Secretary will not exceed, $25,000, for the fiscal year of such contractor or subcontractor.

No renegotiation of the contract price pursuant to any provision therefor, or otherwise, shall be commenced by the Secretary more than one year after the close of the fiscal year of the contractor or subcontractor within which completion or termination of the contract or subcontract, as determined by the Secretary, occurs.

Sec. 403(d). In renegotiating a contract price or determining excessive profits for the purposes of this section, the Secretaries of the respective Departments shall not make any allowance for any salaries, bonuses, or other compensation paid by a contractor to its officers or employees in excess of a reasonable amount, nor shall they make allowance for any excessive reserves set up by the contractor or for any costs incurred by the contractor which are excessive and unreasonable. For the purpose of ascertaining whether such unreasonable compensation has been or is being paid, or whether such excessive reserves have been

or are being set up, or whether any excessive and unreasonable costs have been or are being incurred, each such Secretary shall have the same powers with respect to any such contractor that an agency designated by the President to exercise the powers conferred by title XIII of the Second War Powers Act, 1942, has with respect to any contractor to whom such title is applicable. In the interest of economy and the avoidance of duplication of inspection and audit, the services of the Bureau of Internal Revenue shall, upon request of each such Secretary and the approval of the Secretary of the Treasury, be made available to the extent determined by the Secretary of the Treasury for the purposes of making examinations and determinations with respect to profits under this section.

Sec. 403(e). In addition to the powers conferred by existing law, the Secretary of each Department shall have the right to demand of any contractor who holds contracts with respect to which the provisions of this section are applicable, statements of actual costs of production and such other financial statements, at such times and in such form and detail, as such Secretary may require. Any person who willfully fails or refuses to furnish any statement required of him under this subsection, or who knowingly furnishes any such statement containing information which is false or misleading in any material respect, shall, upon conviction thereof, be punished by a fine of not more than $10,000 or imprisonment for not more than two years, or both. The Powers conferred by this subsection shall be exercised in the case of any contractor by the Secretary of the Department holding the largest amount of such contracts with such contractor, or by such Secretary as may be mutually agreed to by the Secretaries concerned.

Sec. 403(f). Subject to any regulations which the President may prescribe for the protection of the interests of the Government, the authority and discretion herein conferred upon the Secretary of each department may be delegated in whole or in part by him to such individuals or agencies as he may designate in his Department, or in any other Department with the consent of the Secretary

of that Department, and he may authorize such individuals or agencies to make further delegations of such authority and discretion.

Sec. 403(g). If any provision of this section or the application thereof to any person or circumstance is held invalid, the remainder of the section and the application of such provision to other persons or circumstances shall not be affected thereby.

Sec. 403(h). This section shall remain in force during the continuance of the present war and for three years after the termination of the war, but no court proceedings brought under this section shall abate by reason of the termination of the provisions of this section.

Sec. 403(i). (1) The provisions of this section shall not apply to—

(i) any contract by a Department with any other department, bureau, agency, or governmental corporation of the United States or with any Territory, possession, or State or any agency thereof or with any foreign government or any agency thereof; or

(ii) any contract or subcontract for the product of a mine, oil or gas well, or other mineral or natural deposit, or timber, which has not been processed, refined, or treated beyond the first form or state suitable for industrial use; and the Secretaries are authorized by joint regulation, to define, interpret, and apply this exemption.

(2) The Secretary of a Department is authorized, in his discretion, to exempt from some or all of the provisions of this section—

(i) any contract or subcontract to be performed outside of the territorial limits of the continental United States or in Alaska;

(ii) any contracts or subcontracts under which, in the opinion of the Secretary, the profits can be determined with reasonable certainty when the contract

price is established, such as certain classes of agreements for personal services, for the purchase of real property, perishable goods, or commodities the minimum price for the sale of which has been fixed by a public regulatory body, of leases and license agreements, and of agreements where the period of performance under such contract or subcontract will not be in excess of thirty days; and

(iii) a portion of any contract or subcontract or performance thereunder during a specified period or periods, if in the opinion of the Secretary, the provisions of the contract are otherwise adequate to prevent excessive profits.

The Secretary may so exempt contracts and subcontracts both individually and by general classes or types.

Sec. 403(j). Nothing in sections 109 and 113 of the Criminal Code (U. S. C., title 18, secs. 198 and 203) or in section 190 of the Revised Statutes (U. S. C., title 5, sec. 99) shall be deemed to prevent any person appointed by the Secretary of a Department for intermittent and temporary employment in such Department, from acting as counsel, agent, or attorney for prosecuting any claim against the United States;
Provided, That such person shall not prosecute any claim against the United States

(1) which arises from any matter directly connected with which such person is employed, or

(2) during the period such person is engaged in intermittent and temporary employment in a Department.

Sec. 403(k). All the provisions of this section shall be construed to apply to Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company.

Effective Date of Amendments. Subsection (d) of Section 801 of the Revenue Act of 1942 provides:

"The amendments made by this section shall be effective as of April 28, 1942."

Section 5 of Public Law 149, 78th Congress provides:

"The amendments made by this Act shall be effective as of April 28, 1942."

EXHIBIT "B"

Renegotiation Act of 1943

(Applicable to Fiscal Years Ending After June 30, 1943)

RENEGOTIATION ACT OF 1943. Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942 (Public 528, 77th Congress), approved April 28, 1942, as amended by Section 801 of the Revenue Act of 1942 (Public 753, 77th Congress), approved October 21, 1942; by the Military Appropriation Act, 1944 (Public 108, 78th Congress), approved July 1, 1943; by Public 149, 78th Congress, approved July 14, 1943; and as amended in full by Section 701 (b) of the Revenue Act of 1943 (Public 235, 78th Congress), enacted February 25, 1944.

Sec. 403(a). For the purposes of this section—

(1) The term "Department" means the War Department, the Navy Department, the Treasury Department, the Maritime Commission, the War Shipping Administration, Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, respectively.

(2) In the case of the Maritime Commission, the term "Secretary" means the Chairman of such Commission, in the case of the War Shipping Administration, the term "Secretary" means the Administrator of such Administration, and in the case of Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, the term "Secretary" means the board of directors of the appropriate corporation.

(3) The terms "renegotiate" and "renegotiation" include a determination by agreement or order under this section of the amount of any excessive profits.

(4) (A) The term "excessive profits" means the portion of the profits derived from contracts with the Departments and subcontracts which is determined in accordance with this section to be excessive. In determining excessive profits there shall be taken into consideration the following factors:

(i) efficiency of contractor, with particular regard to attainment of quantity and quality production, reduction of costs and economy in the use of materials, facilities, and manpower;

(ii) reasonableness of costs and profits, with particular regard to volume of production, normal pre-war earnings, and comparison of war and peacetime products;

(iii) Amount and source of public and private capital employed and net worth;

(iv) extent of risk assumed, including the risk incident to reasonable pricing policies;

(v) nature and extent of contribution to the war effort, including inventive and developmental contribution and cooperation with the Government and other contractors in supplying technical assistance;

(vi) character of business, including complexity of manufacturing technique, character and extent of subcontracting, and rate of turn-over;

(vii) such other factors the consideration of which the public interest and fair and equitable dealing may require, which factors shall be published in the regulations of the Board from time to time as adopted.

(B) The term "profits derived from contracts with the Departments and subcontracts" means the excess of the amount received or accrued under such contracts and subcontracts over the costs paid or incurred with respect thereto. Such costs shall be determined in accordance with the method of cost accounting regularly employed by the contractor in keeping his books, but if no such method of cost accounting has been employed, or if the method so

employed does not, in the opinion of the Board or, upon redetermination, in the opinion of The Tax Court of the United States properly reflect such costs, such costs shall be determined in accordance with such method as in the opinion of the Board or, upon redetermination, in the opinion of The Tax Court of the United States does properly reflect such costs. Irrespective of the method employed or prescribed for determining such costs, no item of cost shall be charged to any contract with a Department or subcontract or used in any manner for the purpose of determining such cost, to the extent that in the opinion of the Board or, upon redetermination, in the opinion of The Tax Court of the United States, such item is unreasonable or not properly chargeable to such contract or subcontract. Notwithstanding any other provisions of this section, all items estimated to be allowable as deductions and exclusions under Chapters 1 and 2 E of the Internal Revenue Code (excluding taxes measured by income) shall, to the extent allocable to such contracts and subcontracts (or, in the case of the recomputation of the amortization deduction, allocable to contracts with the Departments and subcontracts), be allowed as items of cost, but in determining the amount of excessive profits to be eliminated proper adjustment shall be made on account of the taxes so excluded, other than Federal taxes, which are attributable to the portion of the profits which are not excessive.

(C) Notwithstanding any of the provisions of this section to the contrary, no amount shall be allowed as an item of cost (i) by reason of a recomputation of the amortization deduction pursuant to section 124 (d) of the Internal Revenue Code until after such recomputation has been made in connection with a determination of the taxes imposed by Chapters 1, 2A, 2B, 2D, and 2E of the Internal Revenue Code for the fiscal year to which the excessive profits determined by the renegotiation are attributable or (ii) by reason of the application of a carry-over or carry-back under any circumstances. The absence of such a recomputation of the amortization deductions referred to in clause (i) above shall not constitute a cause for postponing the making of an agreement, or the entry of an order, de-

termining the amount of excessive profits, or for staying the elimination thereof.

(D) Notwithstanding any of the provisions of subsection (c) (4) of this section to the contrary, in the case of a renegotiation which is made prior to such recomputation, there shall be repaid by the United States (without interest) to the contractor or subcontractor after such recomputation the amount of a net renegotiation rebate computed in the following described manner. There shall first be ascertained the portion of the excessive profits determined by the renegotiation which is attributable to the fiscal year with respect to which a net renegotiation rebate is claimed by the contractor or subcontractor (hereinafter referred to as "renegotiated year"). There shall then be ascertained the amount of the gross renegotiation rebate for the renegotiated year, which amount shall be an allocable part of the additional amortization deduction which is allowed for the renegotiated year upon the recomputation made pursuant to section 124 (d) of the Internal Revenue code in connection with the determination of the taxes for such year and which is attributable to contracts with the Departments and subcontracts, except that the amount of the gross renegotiation rebate shall not exceed the amount of excessive profits eliminated for the renegotiated year pursuant to the renegotiation. The allocation of the additional amortization deduction attributable to contracts with the Departments and subcontracts, and the allocation of the additional amortization deduction to the renegotiated year shall be determined in accordance with regulations prescribed by the Board. There shall then be ascertained the amount of the contractor's or subcontractor's Federal tax benefit from the renegotiation for the renegotiated year. Such Federal tax benefit shall be the amount by which the taxes for the renegotiated year under Chapters 1, 2A, 2B, 2D, and 2E of the Internal Revenue Code were decreased by reason of omitting from gross income (or by reason of the application of the provisions of section 3806(a) of the Internal Revenue Code with respect to) that portion of the excessive profits for the renegotiated year which is equal to the amount of the gross renegotiation rebate. The amount by which the

gross renegotiation rebate for the renegotiated year exceeds the amount of the contractor's or subcontractor's Federal tax benefit from the renegotiation for such year shall be the amount of the net renegotiation rebate for such year.

(5) The term "subcontract" means—

(A) Any purchase order or agreement to perform all or any part of the work, or to make or furnish any article, required for the performance of any other contract or subcontract, but such term does not include any purchase order or agreement to furnish office supplies; or

(B) Any contract or arrangement other than a contract or arrangement between two contracting parties, one of which parties is found by the Board to be a bona fide executive officer, partner, or full-time employee of the other contracting party, (i) any amount payable under which is contingent upon the procurement of a contract or contracts with a Department or of a subcontract or subcontracts, or determined with reference to the amount of such a contract or subcontract or such contracts or subcontracts, or (ii) under which any part of the services performed or to be performed consists of the soliciting, attempting to procure, or procuring a contract or contracts with a Department or a subcontract or subcontracts: *Provided,* That nothing in this sentence shall be construed (1) to affect in any way the validity or construction of provisions in any contract with a Department or any subcontract, heretofore at any time or hereafter made, prohibiting the payment of contingent fees or commissions; or (2) to restrict in any way the authority of the Secretary or the Board to determine the nature or amount of selling expenses under subcontracts as defined in this subparagraph, as a proper element of the contract price or as a reimbursable item of cost, under a contract with a Department or a subcontract.

(6) The term "article" includes any material, part, assembly, machinery, equipment, or other personal property.

(7) The term "standard commercial article" means an article—

(A) which is identical in every material respect with an article which was manufactured and sold, and in general civilian, industrial, or commercial use prior to January 1, 1940,

(B) which is identical in every material respect with an article which is manufactured and sold, as a competitive product, by more than one manufacturer, or which is an article of the same kind and having the same use or uses as an article manufactured and sold, as a competitive product, by more than one manufacturer, and

(C) for which a maximum price has been established and is in effect under the Emergency Price Control Act of 1942, as amended, or under the Act of October 2, 1942, entitled "An Act to amend the Emergency Price Control Act of 1942, to aid in preventing inflation, and for other purposes", or which is sold at a price not in excess of the January 1, 1941, selling price.

An article made in whole or in part of substitute materials but otherwise identical in every material respect with the article with which it is compared under subparagraph (A) and (B) shall be considered as identical in every material respect with such article with which it is so compared.

(8) The term "fiscal year" means the taxable year of the contractor or subcontractor under Chapter 1 of the Internal Revenue Code.

(9) The terms "received or accrued" and "paid or incurred" shall be construed according to the method of accounting employed by the contractor or subcontractor in keeping his books.

Sec. 403(b). Subject to subsection (i), the Secretary of each department is authorized and directed to insert in each contract made by such Department thirty days or more after the date of the enactment of the Revenue Act

of 1943 and involving an estimated amount of more than $100,000, a provision under which the contractor agrees—

(1) to the elimination of excessive profits through renegotiation;

(2) that there may be retained by the United States from amounts otherwise due the contractor, or that he will repay to the United States, if paid to him, any excessive profits;

(3) that he will insert in each subcontract described in subsection (a) (5) (A) involving an estimated amount of more than $100,000, and in each subcontract described in subsection (a) (5) (B) involving an estimated amount of more than $25,000, a provision under which the subcontractor agrees—

(A) to the elimination of excessive profits through renegotiation;

(B) that there may be retained by the contractor for the United States from amounts otherwise due the subcontractor, or that the subcontractor will repay to the United States, if paid to him, any excessive profits;

(C) that the contractor shall be relieved of all liability to the subcontractor on account of any amount so retained, or so repaid by the subcontractor to the United States;

(D) that he will insert in each subcontract described in subsection (a) (5) (A) involving an estimated amount of more than $100,000, and in each subcontract described in subsection (a) (5) (B) involving an estimated amount of more than $25,000, provisions corresponding to those of subparagraphs (A), (B), and (C) and to those of this subparagraph;

(4) that there may be retained by the United States from amounts otherwise due the contractor, or that he will repay to the United States, as the Secretary may direct, any amounts which under paragraph (3) (B) the contractor is directed to withhold from a subcontractor and which are actually unpaid at the time the contractor receives such direction.

The obligations assumed by the contractor or subcontractor under paragraph (1) or (3) (A), as the case may be, agreeing to the elimination of excessive profits through renegotiation shall be binding on him only if the contract or subcontract, as the case may be, is subject to subsection (c). A provision inserted in a contract or subcontract, which recites in substance that the contract or subcontract shall be deemed to contain all the provisions required by this subsection shall be sufficient compliance with this subsection. Whether or not there is inserted in a contract with a Department or subcontract, to which subsection (c) is applicable, the provisions specified in this subsection, such contract or subcontract, as the case may be, shall be considered as having been made subject to such subsection in the same manner and to the same extent as if such provisions had been inserted.

Sec. 403(c). (1) Whenever, in the opinion of the Board, the amounts received or accrued under contracts with the Departments and subcontracts may reflect excessive profits, the Board shall give to the contractor or subcontractor, as the case may be, reasonable notice of the time and place of a conference to be held with respect thereto. The mailing of such notice by registered mail to the contractor or subcontractor shall constitute the commencement of the renegotiation proceeding. At the conference, which may be adjourned from time to time, the Board shall endeavor to make a final or other agreement with the contractor or subcontractor with respect to the elimination of excessive profits received or accrued, and with respect to such other matters relating thereto as the Board deems advisable. Any such agreement, if made, may, with the consent of the contractor or subcontractor, also include provisions with respect to the elimination of excessive profits likely to be received or accrued. If the Board does not make an agreement with respect to the elimination of excessive profits received or accrued, it shall issue and enter an order determining the amount, if any, of such excessive profits, and forthwith give notice thereof by registered mail to the contractor or subcontractor. In the absence of the filing of a petition with The Tax Court of the United States under the provisions

of and within the time limit prescribed in subsection (e) (1), such order shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency. The Board shall exercise its powers with respect to the aggregate of the amounts received or accrued during the fiscal year (or such other period as may be fixed by mutual agreement) by a contractor or subcontractor under contracts with the Departments and subcontracts, and not separately with respect to amounts received or accrued under separate contracts with the Departments or subcontracts, except that the Board may exercise such powers separately with respect to amounts received or accrued by the contractor or subcontractor under any one or more separate contracts with the Departments or subcontracts at the request of the contractor or subcontractor. Whenever the Board makes a determination with respect to the amount of excessive profits, whether such determination is made by order or is embodied in an agreement with the contractor or subcontractor, it shall, at the request of the contractor or subcontractor, as the case may be, prepare and furnish such contractor or subcontractor with a statement of such determination, of the facts used as a basis therefor, and of its reasons for such determination. Such statement shall not be used in The Tax Court of the United States as proof of the facts or conclusions stated therein.

(2) Upon the making of an agreement, or the entry of an order, under paragraph (1) by the Board, or the entry of an order under subsection (e) by The Tax Court of the United States, determining excessive profits, the Board shall forthwith authorize and direct the Secretaries or any of them to eliminate such excessive profits (A) by reductions in the amounts otherwise payable to the contractor under contracts with the Departments, or by other revision of their terms; or (B) by withholding from amounts otherwise due to the contractor any amount of such excessive profits; or (C) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to a subcontractor, any amount of such excessive profits of such subcontractor; or (D) by recovery from the contractor, through repayment, credit, or suit any amount

of such excessive profits actually paid to him; or (E) by any combination of these methods, as is deemed desirable. Actions on behalf of the United States may be brought in the appropriate courts of the United States to recover from the contractor any amount of such excessive profits actually paid to him and not withheld or eliminated by some other method under this subsection. The surety under a contract or subcontract shall not be liable for the repayment of any excessive profits thereon. Each contractor and subcontractor is hereby indemnified by the United States against all claims by any subcontractor on account of amounts withheld from such subcontractor pursuant to this paragraph. All money recovered in respect of amounts paid to the contractor from appropriations from the Treasury by way of repayment or suit under this subsection shall be covered into the Treasury as miscellaneous receipts. Upon the withholding of any amount of excessive profits or the crediting of any amount of excessive profits against amounts otherwise due a contractor, the Secretary shall certify the amount thereof to the Treasury and the appropriations of his Department shall be reduced by an amount equal to the amount so withheld or credited. The amount of such reductions shall be transferred to the surplus fund of the Treasury. In eliminating excessive profits the Secretary shall allow the contractor or subcontractor credit for Federal income and excess profits taxes as provided in section 3806 of the Internal Revenue Code. For the purposes of this paragraph the term "contractor" includes a subcontractor.

(3) No proceeding to determine the amount of excessive profits shall be commenced more than one year after the close of the fiscal year in which such excessive profits were received or accrued, or more than one year after the statement required under paragraph (5) is filed with the Board, whichever is the later, and if such proceeding is not so commenced, then upon the expiration of one year following the close of such fiscal year, or one year following the date upon which such statement is so filed, whichever is the later, all liabilities of the contractor or subcontractor for excessive profits received or accrued during such fiscal year shall

thereupon be discharged. If an agreement or order determining the amount of excessive profits is not made within one year following the commencement of the renegotiation proceeding, then upon the expiration of such one year all liabilities of the contractor or subcontractor for excessive profits with respect to which such proceeding was commenced shall thereupon be discharged, except that (A) if an order is made within such one year by the Secretary (or an officer or agency designated by the Secretary) pursuant to a delegation of authority under subsection (d)(4), such one-year limitation shall not apply to review of such order by the Board, and (B) such one-year period may be extended by mutual agreement.

(4) For the purposes of this section the Board may make final or other agreements with a contractor or subcontractor for the elimination of excessive profits and for the discharge of any liability for excessive profits under this section. Such agreements may contain such terms and conditions as the Board deems advisable. Any such agreement shall be conclusive according to its terms; and except upon a showing of fraud or malfeasance or a willful misrepresentation of a material fact, (A) such agreement shall not for the purpose of this section be reopened as to the matters agreed upon, and shall not be modified by any officer, employee, or agent of the United States, and (B) such agreement and any determination made in accordance therewith shall not be annulled, modified, set aside, or disregarded in any suit, action, or proceeding.

(5)(A) Every contractor and subcontractor who holds contracts or subcontracts, to which the provisions of this subsection are applicable, shall, in such form and detail as the Board may by regulations, prescribe, file with the Board on or before the first day of the fourth month following the close of the fiscal year (or if such fiscal year has closed on the date of the enactment of the Revenue Act of 1943, on or before the first day of the fourth month following the month in which such date of enactment falls), a financial statement setting forth such information as the Board may by regulations prescribe as necessary to carry

out this section.* In addition to the statement required under the preceding sentence, every such contractor or subcontractor shall, at such time or times and in such form and detail as the Board may by regulations prescribe, furnish the Board any information, records, or data which is determined by the Board to be necessary to carry out this section. Any person who willfully fails or refuses to furnish any statement, information, records, or data required of them under this subsection, or who knowingly furnishes any such statement, information, records, or data containing information which is false or misleading in any material respect shall, upon conviction thereof, be punished by a fine of not more than $10,000 or imprisonment for not more than two years, or both.

(B) For the purpose of this section the Board shall have the same powers with respect to any such contractor or subcontractor that any agency designated by the President to exercise the powers conferred by Title XIII of the Second War Powers Act, 1942, has with respect to any contractor to whom such title is applicable. In the interest of economy and the avoidance of duplication of inspection and audit, the services of the Bureau of Internal Revenue shall, upon request of the Board and the approval of the Secretary of the Treasury, be made available to the extent determined by the Secretary of the Treasury for the purpose of making examinations and audits under this section.

(6) This subsection shall be applicable to all contracts and subcontracts, to the extent of amounts received or accrued thereunder in any fiscal year ending after June 30, 1943, whether such contracts or subcontracts were made on, prior to, or after the date of the enactment of the Revenue Act of 1943, and whether or not such contracts or subcontracts contain the provisions required under subsection (b), unless (A) the contract or subcontract provides

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* Copies of the appropriate form may be obtained upon request to the War Contracts Price Adjustment Board, Assignments and Statistics Branch, Renegotiation Division, Room 3D573, The Pentagon, Washington 25, D. C.

otherwise pursuant to subsection (i), or is exempted under subsection (i), or (B) the aggregate of the amounts received or accrued in such fiscal year by the contractor or subcontractor and all persons under the control of or controlling or under common control with the contractor or subcontractor, under contracts with the Departments and subcontracts (including those described in clause (A), but excluding subcontracts described in subsection (a)(5)(B) do not exceed $500,000 and under subcontracts described in subsection (a)(5)(B) do not exceed $25,000 for such fiscal year. If such fiscal year is a fractional part of twelve months, the $500,000 amount and the $25,000 amount shall be reduced to the same fractional part thereof for the purposes of this paragraph.

Sec. 403(d). (1) There is hereby created a War Contracts Price Adjustment Board (in this section called the "Board"), which shall consist of six members. One of the members shall be an officer or employee of the Department of War and shall be appointed by the Secretary of War, one shall be an officer or employee of the Department of the Navy and shall be appointed by the Secretary of the Navy, one shall be an officer or employee of the Department of the Treasury and shall be appointed by the Secretary of the Treasury, one shall be an officer or employee of the United States Maritime Commission or the War Shipping Administration and shall be appointed jointly by the Chairman of the United States Maritime Commission and the Administrator of the War Shipping Administration, Chairman of the Board of Directors of the Reconstruction Finance Corporation and shall be appointed by the Chairman of the Board of directors of the Reconstruction Finance Corporation, and one shall be an officer or employee of the War Production Board and shall be appointed by the Chairman of the War Production Board. The members of the Board shall not receive additional compensation for service on the Board but shall be allowed and paid necessary travel and subsistence expenses (or a per diem in lieu thereof) while away from their official station on duties of the Board. They shall elect a chairman from among their members. The Board shall have a seal which shall be judicially noticed.

(2) The principal office of the Board shall be in the District of Columbia, but it or any division thereof may meet and exercise its powers at any other place within the United States. The Board may establish such number of field offices throughout the United States as it deems necessary to expedite the work of the Board. Four members of the Board shall constitute a quorum, and any power, function, or duty of the Board may be exercised or performed by a majority of the members present if the members present constitute at least a quorum.

(3) The Board is authorized, subject to the civil-service laws and the Classification Act of 1923, as amended, to employ and fix the compensation of such officers and employees as it deems necessary to assist it in carrying out its duties under this section. The Board may, with the consent of the head of the Department, agency, or instrumentality of the United States concerned, utilize the services of any officers or employees of the United States, and reimburse such Department, agency, or instrumentality for the services so utilized.

(4) The Board may delegate in whole or in part any power, function, or duty to the Secretary of a Department, and any power, function, or duty so delegated may be delegated in whole or in part by the Secretary to such officers or agencies of the United States as he may designate, and he may authorize successive redelegations of such powers, functions, and duties.

(5) The Chairman of the Board may from time to time divide the Board into divisions of one or more members, assign the members of the Board thereto, and in case of a division of more than one member, designate the chief thereof. The Board may also, by regulations or otherwise, determine the character of cases to be conducted initially by the Board through an officer or officers of, or utilized by, the Board, the character of cases to be conducted initially by the various officers and agencies authorized to exercise powers of the Board pursuant to paragraph (4), the character of cases to be conducted initially by the various divisions of the Board, and the character of cases

to be conducted initially by the Board itself. The Board may review any determination by any such officer, agency or division on its own motion, or in its discretion at the request of any contractor or subcontractor aggrieved thereby. Unless the Board upon its own motion initiates a review of such determination within 60 days from the date of such determination, or at the request of the contractor or subcontractor made within 60 days from the date of such determination initiates a review of such determination within 60 days from the date of such request, such determination shall be deemed the determination of the Board. Upon any review by the Board the Board may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the officer, agency, or division whose action is so reviewed.

Sec. 403(e). (1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c)(1), file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. For the purposes of this subsection the court shall have the same powers and duties, insofar as applicable, in respect of the contractor, the subcontractor, the Board and the Secretary, and in respect of the attendance of witnesses and the production of papers, notice of hearings, hearings

before divisions, review by the Tax Court of decisions of divisions, stenographic reporting, and reports of proceedings, as such court has under sections 1110, 1111, 1113, 1114, 1115(a), 1116, 1117(a), 1118, 1120, and 1121 of the Internal Revenue Code in the case of a proceeding to redetermine a deficiency. In the case of any witness for the Board or Secretary, the fees and mileage, and the expenses of taking any deposition shall be paid out of appropriations of the Board or Department available for that purpose, and in the case of any other witnesses, shall be paid, subject to rules prescribed by the court, by the party at whose instance the witness appears or the deposition is taken. The filing of a petition under this subsection shall not operate to stay the execution of the order of the Board under subsection (c)(2).

(2) Any contractor or subcontractor (excluding a subcontractor described in subsection (a) (5) (B)) aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with The Tax Court of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of such determination, file a petition with The Tax Court of the United States for redetermination thereof. Upon such filings such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1), except that the amendments made to this section by the

Revenue Act of 1943 which are not made applicable as of April 28, 1942, or to fiscal years ending before July 1, 1943, shall not apply.

Sec. 403(f). For repricing of war contracts, see Title VIII of the Revenue Act of 1943.

Sec. 403(g). If any provision of this section or the application thereof to any person or circumstance is held invalid, the remainder of the section and the application of such provision to other persons or circumstances shall not be affected thereby.

Sec. 403(h). This section shall apply only with respect to profits derived from contracts with the Departments and subcontracts which are attributable to performance prior to the termination date. For the purposes of this subsection—

(1) The profits derived from any contract with a Department or subcontract which shall be deemed "attributable to performance prior to the termination date" shall be—

(A) in the case of any contract or subcontract the performance of which requires more than twelve months, or in the case of any contract or subcontract with respect to which the powers of the Board are exercised separately pursuant to subsection (c) (1) rather than on a fiscal-year basis, the portion of the profits so derived which is determined by the Board to be equal to the same percentage of the total profits so derived as the percentage of completion of the contract prior to the termination date; and

(B) in all other cases, the profits so derived which are received or accrued prior to the termination date; and

(2) The term "termination date" means—

(A) December 31, 1944; or

(B) If the President not later than December 1, 1944, finds and by proclamation declares that competitive conditions have not been restored, such date not

later than June 30, 1945, as may be specified by the President in such proclamation as the termination date; or

(C) If the President, not later than June 30, 1945, finds and by proclamation declares that competitive conditions have been restored as of any date within six months prior to the issuance of such proclamation, the date as of which the President in such proclamation declares that competitive conditions have been restored;

except that in no event shall the termination date extend beyond the date proclaimed by the President as the date of the termination of hostilities in the present war, or the date specified in a concurrent resolution of the two Houses of Congress as the date of such termination, whichever is the earlier.

Sec. 403(i). (1) The provisions of this section shall not apply to——

(A) Any contract by a Department with any other department, bureau, agency, or governmental corporation of the United States or with any Territory, possession, or State or any agency thereof or with any foreign government or any agency thereof; or

(B) any contract or subcontract for the product of a mine, oil or gas well, or other mineral or natural deposit, or timber, which has not been processed, refined, or treated beyond the first form or state suitable for industrial use; or

(C) any contract or subcontract for an agricultural commodity in its raw or natural state, or if the commodity is not customarily sold or has not an established market in its raw or natural state, in the first form or state, beyond the raw or natural state, in which it is customarily sold or in which it has an established market. The term "agricultural commodity" as used herein shall include but shall not be limited to—

(i) commodities resulting from the cultivation of the soil such as grains of all kinds, fruits, nuts, vege-

tables, hay, straw, cotton, tobacco, sugar cane, and sugar beets;

(ii) natural resins, saps and gums of trees;

(iii) animals such as cattle, hogs, poultry, and sheep, fish and other marine life, and the produce of live animals, such as wool, eggs, milk and cream; or

(D) any contract or subcontract with an organization exempt from taxation under section 101 (6) of the Internal Revenue Code; or

(E) any contract with a Department, awarded as a result of competitive bidding, for the construction of any building, structure, improvement, or facility; or

(F) any subcontract, directly or indirectly under a contract or subcontract to which this section does not apply by reason of this paragraph.

(2) The Board is authorized by regulation to interpret and apply the exemptions provided for in paragraph (1) (A), (B), (C), (E), and (F), and interpret and apply the definition contained in subsection (a) (7).

(3) In the case of a contractor or subcontractor who produces or acquires the product of a mine, oil or gas well, or other mineral or natural deposit, or timber, and processes, refines, or treats such a product to and beyond the first form or state suitable for industrial use, or who produces or acquires an agricultural product and processes, refines, or treats such a product to and beyond the first form or state in which it is customarily sold or in which it has an established market, the Board shall prescribe such regulations as may be necessary to give such contractor or subcontractor a cost allowance substantially equivalent to the amount which would have been realized by such contractor or subcontractor if he had sold such product at such first form or state. Notwithstanding any other provisions of this section there shall be excluded from consideration in determining whether or not a contractor or subcontractor has received or accrued excessive profits that portion of the profits, derived from contracts with the Departments

and subcontracts, attributable to the increment in value of the excess inventory. For the purposes of this paragraph the term "excess inventory" means inventory of products, hereinbefore described in this paragraph, acquired by the contractor or subcontractor in the form or at the state in which contracts for such products on hand or on contract would be exempted from this section by subsection (i) (1) (B) or (C), which is in excess of the inventory reasonably necessary to fulfill existing contracts or orders. That portion of the profits, derived from contracts with the Departments and subcontracts, attributable to the increment in value of the excess inventory, and the method of excluding such portion of profits from consideration in determining whether or not the contractor or subcontractor has received or accrued excessive profits, shall be determined in accordance with regulations prescribed by the Board. In the case of a renegotiation with respect to a fiscal year ending prior to July 1, 1943, the portion of the profits, derived from contracts with the Departments and subcontracts, attributable to the increment in value of the excess inventory shall (to the extent such portion does not exceed the excessive profits determined), be credited or refunded to the contractor or subcontractor, and in case the determination of excessive profits was made prior to the date of the enactment of the Revenue Act of 1943, such credit or refund shall be made notwithstanding such determination is embodied in an agreement with the contractor or subcontractor, but in either case such credit or refund shall be made only if the contractor or subcontractor, within ninety days after the date of the enactment of the Revenue Act of 1943, files a claim therefor with the Secretary concerned.

(4) The Board is authorized, in its discretion, to exempt from some or all of the provisions of this section—

(A) any contract or subcontract to be performed outside of the territorial limits of the continental United States or in Alaska;

(B) any contracts or subcontracts under which, in the opinion of the Board, the profits can be determined with reasonable certainty when the contract price is established,

such as certain classes of agreements for personal services, for the purchase of real property, perishable goods, or commodities the minimum price for the sale of which has been fixed by a public regulatory body, of leases and license agreements, and of agreements where the period of performance under such contract or subcontract will not be in excess of thirty days;

(C) any contract or subcontract or performance thereunder during a specified period or periods, if in the opinion of the Board, the provisions of the contract are otherwise adequate to prevent excessive profits;

(D) any contract or subcontract for the making or furnishing of a standard commercial article, if, in the opinion of the Board, competitive conditions affecting the sale of such article are such as will reasonably protect the Government against excessive prices;

(E) any contract or subcontract, if, in the opinion of the Board, competitive conditions affecting the making of such contract or subcontract are such as are likely to result in effective competition with respect to the contract or subcontract price; and

(F) any subcontract or group of subcontracts not otherwise exempt from the provisions of this section, if in the opinion of the Board, it is not administratively feasible in the case of such subcontract or in the case of such group of subcontracts to determine and segregate the profits attributable to such subcontract or group of subcontracts from the profits attributable to activities not subject to renegotiation. The Board may so exempt contracts and subcontracts both individually and by general classes or types.

Sec. 403 (j). Nothing in sections 109 and 113 of the Criminal Code (U. S. C., title 18, secs. 198 and 203) or in section 190 of the Revised Statutes (U. S. C., title 5, sec. 99) shall be deemed to prevent any person by reason of service in a Department or the Board during the period (or a part thereof) beginning May 27, 1940, and ending six months after the termination of hostilities in the present war, as proclaimed by the President, from acting as counsel, agent,

or attorney for prosecuting any claim against the United States: *Provided,* That such person shall not prosecute any claim against the United States (1) involving any subject matter directly connected with which such person was so employed, or (2) during the period such person is engaged in employment in a Department.

Sec. 403 (k). Nothing in this section shall be construed to limit or restrict any authority or discretion of the Secretary of a Department under the provisions of any other law.

Sec. 403 (l). This section may be cited as the "Renegotiation Act."

Effective date of Section 403. Section 701 (d) of the Revenue Act of 1943 provides:

> "The amendments made by subsection (b) shall be effective only with respect to the fiscal years ending after June 30, 1943, except that (1) the amendments inserting subsections (a) (4) (C), (a) (4) (D), (i) (1) (C), (i) (1) (D), (i) (1) (F), (i) (3), and (1) in section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, shall be effective as if such amendments and subsections had been a part of Section 403 of such Act on the date of its enactment, and (2) the amendments adding subsection (d) and (e) (2) to section 403 of such Act shall be effective from the date of the enactment of this Act."

AIRCRAFT & DIESEL EQUIPMENT CORPORATION, a Corporation,

vs.

MAURICE HIRSCH, et al.

Civil Action No. 28999

Note: Exhibit "C" attached here, is the same as the Opinion, at page 628 of this transcript.

EXHIBIT "C"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Filed Sept. 28, 1945. Chas. E. Stewart, Clerk

Civil Action No. 28999

AIRCRAFT & DIESEL EQUIPMENT CORPORATION, a Corporation, *Plaintiff*,

v.

MAURICE HIRSCH, W. JOHN KENNY, JOHN R. PAUL, H. C. MAULL, JR., GLADDING B. COIT, CARMAN B. BLOUGH, HENRY L. STIMSON, Secretary of War; ROBERT P. PATTERSON, Under Secretary of War, *Defendants*

Before Miller, Associate Justice, United States Court of Appeals, District of Columbia, and Bailey and Proctor, Associate Justices, District Court of the United States for the District of Columbia, Sitting as a Statutory Three-judge Court

BAILEY, *J.*:

The plaintiff is a corporation under the laws of the State of Delaware. The defendant Henry L. Stimson was the Secretary of War and the defendant Robert P. Patterson was the Under Secretary of War at the time of the filing of the amended complaint. The remaining defendants are the members of The War Contracts Price Adjustment Board.

This is a suit filed by the plaintiff, seeking a declaratory judgment to the effect that the original Renegotiation Act passed by Congress on April 28, 1942 and the later Act which became effective on February 25, 1944, being Title VII of the Revenue Act of 1943 which amended and re-enacted the Act of April 28, 1942, is each unconstitutional as repugnant to Articles I and II and Amendments V, VII and X of the Constitution of the United States.

The plaintiff has filed an amended and supplemental complaint in which it also seeks injunctive relief restraining the

defendants from further proceeding under the Renegotiation Act and particularly under Sections 403(c)(2) and 403-(e)-(1) in so far as said Act and said sections provide for the taking of plaintiff's "property" without any form of judicial review, and, in addition, injunctive relief restraining the defendants from taking plaintiff's "property" prior to a redetermination by The Tax Court of the United States of the determination of the War Contracts Price Adjustment Board, for the reason that said order was entered by the Board illegally, arbitrarily, capriciously and without regard to the evidence then before it, finally, that the enforcement of said order of January 11, 1945 will cause plaintiff irreparable injury, and this latter relief is sought also under the general equity powers of the Court.

The amended complaint states that the plaintiff made a contract with the United States Navy on May 21, 1941, under which it agreed to furnish certain pumps to the United States Navy; that on March 17, 1942 it entered into an agreement supplemental to contract of May 21, 1941, by which plaintiff agreed to furnish certain pumps and other material to the United States Navy, and that during the fiscal year ended November 30, 1943, it furnished to the Navy Department pumps and other material as had not been previously furnished on the supplemental contract of March 27, 1942, and that all the equipment delivered by the plaintiff to the United States Navy in the fiscal year ended November 30, 1943 were all paid for by the United States on or before the 27th day of August 1943; that after certain proceedings and conferences the War Contracts Price Adjustment Board notified plaintiff that it had received excessive profits of $1,265,000 in the fiscal year ended November 30, 1943 and that on or about January 11, 1945 plaintiff was notified of the entrance and issuance of an order by the defendant, Robert P. Patterson, Under Secretary of War, acting as a delegate of the War Contracts Price Adjustment Board that plaintiff had realized the said excessive profits in the said fiscal year and plaintiff was directed to pay that sum, less applicable taxes previously paid, to the Treasury of the United States; that on February 28, 1945 plaintiff requested the said Board to initiate a review of the above

determination but that on May 3, 1945 the Board refused to do so; that under the provisions of Section 403(c)(2) of the Renegotiation Act the Board may direct the defendant Henry L. Stimson, Secretary of War, to direct contractors or sub-contractors for whom the plaintiff had done work under contract or pursuant to sales orders, to withhold such sums of money due the plaintiff as will aggregate $1,265,000 less applicable tax adjustment; that on April 4, 1945 plaintiff, pursuant to right granted by Section 403-(e)(1) of the Renegotiation Act, petitioned the Tax Court of the United States to redetermine the excessive profits, if any, realized during the fiscal year ended November 30, 1943; that the United States filed a motion to strike this petition on the ground that it was filed prematurely; that this motion was heard on May 16, 1945 but that in the event The Tax Court shall dismiss said petition, the plaintiff will file another petition in The Tax Court for the same purpose; that "notwithstanding the fact that the plaintiff has filed its petition for redetermination in the Tax Court of the United States whereby it seeks an orderly determination of the amount, if any, it may owe to the United States of America, as excessive profits for its fiscal year ending November 30, 1943," the War Contracts Price Adjustment Board purposes to direct the Secretary of War to withhold moneys due to the plaintiff by said contracts for the account of the United States in the amounts determined by it to be due as excessive profits and the Secretary of War purposes to follow such directions; that in the event of such seizure of such amounts due to the plaintiff or the payment thereof by customers thereof to the Treasury, the amounts so seized or paid would be transferred to the Surplus Fund of the United States Treasury; that the Renegotiation Act in so far as it may authorize such seizure is in violation of rights guaranteed to the plaintiff by the Constitution of the United States; that "there was, as of May 1, 1945, due plaintiff from its customers (they being firms, individuals and corporations, other than the United States of America, or any department, agency or instrumentality thereof) approximately $274,000, and on that date plaintiff had on its books unfilled orders from such customers and others (not the

United States of America or any department, agency or instrumentality thereof), calling for the manufacture and sale of its products at prices approximately aggregating $890,000. The said sums now due, or such portion thereof as the War Contracts Price Adjustment Board has determined should be withheld and paid into the Treasury, and other sums which may become due in the future, Henry L. Stimson or his delegates will, as his delegate Robert P. Patterson did in a prior year, direct to be withheld from the plaintiff and paid into the Treasury of the United States. Plaintiff avers that, after adjustment for Federal income and excess profits taxes, the amount involved in the order and decision of War Contracts Price Adjustment Board does not and can not exceed $275,000, but defendant Henry L. Stimson, acting at the threatened direction of the War Contracts Price Adjustment Board nevertheless threatens to, and will, unless enjoined and restrained, order the withholding from the plaintiff and the payment by plaintiff's customers of said sums of money into the Treasury of the United States;" that the action of the War Contracts Price Adjustment Board was arbitrary; it refused to state the ground upon which it acted and this was in violation of the provisions of the Constitution in that it acted without due process of law.

The amended complaint further sets out certain transactions which it claims were contracts entered into before the passage of the original Renegotiation Act under which various articles were sold, some of which were sold and delivered after the passage of that Act and some before, and that the action of the defendants in making any redetermination of all profits arising under these contracts was unconstitutional and void; that as to contracts entered into after the passage of the Renegotiation Act, in so far as they might be controlled by the Act, the Act was so indefinite and uncertain and was unconstitutional in investing administrative bodies with the legislative powers without sufficiently defining the terms and conditions under which these powers were to be exercised.

The amended complaint seeks an injunction enjoining the defendants from eliminating any excessive profits of the

plaintiff determined by the War Contracts Price Adjustment Board by directing any customers of the plaintiff to withhold for the account of the United States, or otherwise, any moneys due to the plaintiff or directing any such customers to pay any money due to the plaintiff into the Treasury of the United States.

The preliminary question to be determined is the jurisdiction of equity. In the first place the plaintiff has filed its petition in The Tax Court of the United States, seeking a determination of the amount of excess profits, if any, which it has earned if the Renegotiation Act be constitutional. It is enough to say that if The Tax Court of the United States should hold that the plaintiff received no excess profits, then the constitutionality of the Act of Congress is immaterial so far as the rights of the plaintiff are concerned and for that reason the suit is premature.

In addition to this, equity has no jurisdiction for the reason that the plaintiff has complete remedies by actions at law. It claims that certain parties are indebted to it by reason of certain contracts; the payment of these claims under a judgment at law would give a full, adequate and complete remedy. These debtors are not numerous, and so far as the plaintiff's being entitled to relief to avoid a multiplicity of suits, it has a complete remedy in the Court of Claims for all sums of which it may be deprived, if the Renegotiation Act be unconstitutional.

In the case of *Coffman* v. *Breeze Corporations, Inc., et al.*, 323 U. S. 316, which was a suit by a patent owner against his licensees, seeking an adjudication of unconstitutionality of the Royalty Adjustment Act and seeking an injunction against the licensees from complying with the Act by paying the balance in excess of royalty payments and in excess of the amount declared by the War and Navy Departments to be fair and just into the Treasury of the United States, the Court held that equity was without jurisdiction. The Act in question in that case deprived the licensor of any remedy. The Court said:

> "The only rights asserted as the basis for the relief sought by appellant are derived from the license agreements. These agreements, so far as now appears and

as we assume for present purposes, are contractual obligations to pay the stipulated royalties. As they accrue, the royalties become simple debts recoverable in an action at law, or possibly, where the accounts are complicated, in a proceeding for an accounting such as appellant has already begun in its separate suit pending in the District Court of New Jersey. *Kirby* v. *Lake Shore & M. S. R. Co.*, 120 U. S. 130; *United States* v. *Old Settlers*, 148 U. S. 427, 465.

"Appellant does not in the present suit bring to our attention any facts showing or tending to show that a suit to recover a money judgment for the royalties would not afford complete and adequate relief without resort to an equitable remedy. In such a suit if appellee Breeze is obligated by the contracts in question to pay the royalties to appellant, it can discharge that obligation only by payment of the amount due, or by setting up the Royalty Adjustment Act as a defense. Compliance with the duty under the Act to pay into the Treasury the royalties withheld from appellant would operate by the terms of the Act as a discharge of the obligation to pay appellant. If that defense were offered, the constitutional validity of these provisions of the Act would be a justiciable issue in the case, since upon its adjudication would depend appellant's right to recovery.

"But whether the provisions of the Act be valid or invalid appellant shows no ground for equitable relief. If valid they would be a defense, and appellant would be entitled to no relief other than that afforded by the suit against the Government authorized by § 2 of the Act. If invalid, appellant's right to recover remains unimpaired. The sufficiency of the defense may be as readily tested in a suit at law to recover the royalties as by the present suit in equity to enjoin payment of the royalties into the Treasury. In either case appellant would receive all the relief to which it shows itself entitled."

The Act of Congress involved in the *Coffman case* is very similar to the Act in this case and there is no reason why

the plaintiff has not a complete and adequate remedy by suit against its customers for any sums that may be due from them, if the Act be unconstitutional; and, as to any liability on the part of the United States, its remedy is in the Court of Claims.

The plaintiff contends that the *Coffman case* was decided simply upon the ground that the complaint did not allege that the plaintiff in that case would be irreparably injured. It is not sufficient, however, to allege irreparable injury without showing the facts upon which that injury follows. In this case, mere delay in the collection of sums due to the plaintiff, the complaint not stating that the debtors are or are likely to become insolvent, does not constitute irreparable injury.

So far as the administrative procedure is concerned, any defects in the hearing before the War Contracts Price Adjustment Board are immaterial so long as the plaintiff obtains a full hearing before The Tax Court of the United States. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333.

In the case of *Arrow Distilleries, Inc.* v. *Alexander*, 24 Fed. Supp. 880, which was affirmed by the Supreme Court of the United States in 306 U. S. 615, it was held that one is not entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted, even though the question of the constitutionality of the statute prescribing the administrative remedy is undecided.

We conclude, therefore, that the suit is premature and, in addition, that equity has no jurisdiction.

The motions of the defendants to dismiss the amended complaint and for a summary judgment will each be sustained without prejudice, however, to the right of the plaintiff to maintain actions at law against its debtors and to bring suit as it may be advised in the Court of Claims.

(S.) JUSTICE MILLER.
(S.) JENNINGS BAILEY.
(S.) JAMES M. PROCTOR.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946

No. 95

AIRCRAFT & DIESEL EQUIPMENT CORPORATION,
Appellant,

vs.

MAURICE HIRSCH, E. D. McDOUGAL, JOHN R. PAUL, *et al.*,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR AIRCRAFT & DIESEL EQUIPMENT CORPORATION, APPELLANT.

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Printed as Exhibit A in Statement as to Jurisdiction, pp. 29-39.

(56 Stat. 226, 245; as amended by 56 Stat. 798, 982; as amended by 57 Stat. 347, 348 as amended by 57 Stat. 564.)

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Printed in Exhibit B in Statement as to Jurisdiction, pp. 39-60.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946

No. 95

AIRCRAFT & DIESEL EQUIPMENT CORPORATION,
Appellant,

vs.

MAURICE HIRSCH, E. D. McDOUGAL, JOHN R. PAUL, *et al.*,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR AIRCRAFT & DIESEL EQUIPMENT CORPORATION, APPELLANT.

OFFICIAL REPORT OF OPINION BELOW.

The opinion of the District Court of the United States for the District of Columbia is reported in 62 Federal Supplement, page 520. That report shows the opinion to have been filed September 28, 1945.

After the complaint was filed, a three-judge court was constituted pursuant to the provisions of Section 380 (a), Title 28, U.S. Code. This Court consisted of Mr. Justice Miller, Mr. Justice Bailey and Mr. Justice Proctor.

Thereafter a motion for a temporary injunction was filed by appellant and motions for summary judgment and for dismissal of the complaint were filed by appellees. (R. 1-4) On June 18, 1945 the court so constituted heard oral arguments on these motions, during the course of which leave was granted appellant to file an amended and supplemental complaint alleging in detail the sales made on contracts executed prior to April 28, 1942. (R. 132) The motions previously made were, by agreement, to be considered as having been made upon, and to the complaint as amended and supplemented.

On July 2, 1945, the amended and supplemental complaint, hereinafter termed the complaint, with supporting affidavits was filed, and the court took the several motions under advisement upon the arguments previously made, and upon briefs. On September 28, 1945, that statutory court filed the opinion with the clerk of the court, which is reported in **62 Federal Supplement 520.**

On October 1, 1945, and prior to the entry of any order in this case, Mr. Justice Miller's resignation as an Associate Justice of the United States Court of Appeals, District of Columbia, became effective.

Because of the uncertainty as to whether Mr. Justice Bailey and Mr. Justice Proctor constituted a statutory court with power to enter any order after Mr. Justice Miller's resignation became effective, a new court was constituted upon appellant's motion, consisting of Mr. Justice Edgerton, Mr. Justice Bailey and Mr. Justice Proctor. (R. 438) This court considered the matter on the arguments made before the original court on June 18, 1945, and on all the briefs filed. On March 5, 1946, this last constituted court entered an order denying the injunction and dismissing the amended and supplemental complaint. (R. 439)

No other or additional opinion was filed.

STATEMENT OF JURISDICTION.

The statutory provision pursuant to which appellant invokes the jurisdiction of this Court is Section 380 (a), Title 28, U.S. Code.

In the complaint, it was alleged that Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942 as amended, (Public Law 528, 77th Congress) and the Renegotiation Act (Section 801 of the Revenue Act of 1943, Public Law 235, 78th Congress) were, and each was, repugnant to Article I, Section 1; Article III, Sections 1 and 2 of the Constitution of the United States and to the Fifth, Seventh and Tenth Amendments to the Constitution.

The complaint prayed for an interlocutory and permanent injunction restraining the appellees from further proceeding under the provisions of the Renegotiation Act. (R. 164-168)

The order entered March 5, 1946 denied the interlocutory and permanent injunction and dismissed the case. (R. 439)

Under the foregoing facts a direct appeal is allowed to this Court. (Section 380 (a), Title 28, U.S. Code) This Court so held in *Mine Safety Appliances Company* v. *Forrestal*, 326 U.S. 371, and in *Coffman* v. *Breeze Corporations*, 323 U.S. 316.

An order of probable jurisdiction was entered by this Court on May 27, 1946.

QUESTIONS PRESENTED.

The first question is whether the renegotiation acts or either of them contravene any of the provisions of Article I, Section 1; Article III, Section 1 and 2 of the Constitution of the United States, or the Fifth, Seventh and Tenth Amendments thereto. The District Court did not decide this question.

The second question is whether the District Court was correct in sustaining appellees' motion to dismiss the complaint and for a summary judgment, for the reason that equity had no jurisdiction. The District Court in sustaining the motion, and in entering judgment against appellant held that appellant had adequate remedies, and that the suit was prematurely instituted.

STATUTES INVOLVED.

In the Statement As To Jurisdiction, previously filed, there appears as Exhibit "A", pages 29-39, Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, (Public Law 528, 77th Congress), approved April 28, 1942, 56 Stat. 226, 245; as amended by Section 801 of the Revenue Act of 1942 (Public Law 753, 77th Congress) Chapter 619, approved October 21, 1942; 56 Stat. 798, 982; as amended by the Military Appropriation Act, 1944, (Public Law 108, 78th Congress) approved July 1, 1943, Chapter 158, 57 Stat. 347, 348; as amended by Public Law 149, (78th Congress) approved July 14, 1943, Chapter 239, 57 Stat. 564, (U.S.C. 1940 Ed. Supp. III Appendix 1191), which said act as so amended is referred to herein as the "first act," and which purports to apply to fiscal years ending before July 1, 1943.

There is also printed in the Statement As To Juris-

diction, as Exhibit "B," pages 39-60, the Renegotiation Act, being Section 701 of the Revenue Act of 1943, Public Law 235, 78th Congress, effective February 25, 1944, 58 Stat. 78, 92, which is referred to herein as the "second act," and which purports to apply to fiscal years ending after July 1, 1943.

STATEMENT OF THE CASE.

This case comes to this Court upon an appeal from an order denying appellant's motion for a temporary and permanent injunction and sustaining appellees' motions to dismiss the complaint and for summary judgment. (R. 449) The injunction was sought to restrain the appellees, members of the War Contracts Price Adjustment Board, herein called the Board, the Secretary of War, and the Under Secretary of War, from attempting to collect from appellant's customers the amount asserted to be due from appellant upon a determination of alleged excessive profits realized by appellant during the fiscal year ended November 30, 1943, made by the War Contracts Price Adjustment Board, pursuant to the Renegotiation Act.

The complaint alleged that the Renegotiation Act (enacted February 25, 1944, and referred to as the second act) and Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942 (enacted April 28, 1942 and referred to as the first act) were, and each was, in whole and in parts, repugnant to Section 1 of Article I; and Sections 1 and 2 of Article III of the Constitution of the United States and to the Fifth, Seventh and Tenth Amendments. (R. 145, 146, 153, 159, 166)

The purposes of asserting the unconstitutionality of both acts and at the same time praying an injunction restraining collection of the amount allegedly due under the second act were, (a) to demonstrate, as is now ad-

mitted by appellees, that appellant's belief that appellees would attempt to make collection prior to a determination of the validity of the law or of the correctness of the determination, was well founded, and, (b) to demonstrate the illegality and the injustice of the collection of an additional $270,000 under the second Act, prior to an adjudication of its constitutionality when $204,000 had already been collected under the first Act, alleged to be unconstitutional, and in regard to which no determination had been made.

The complaint alleged the making of the unilateral determination by Under Secretary of War, on October 27, 1943 and the filing on May 18, 1944, after the enactment of the Renegotiation Act of a petition for redetermination in The Tax Court. (R. 135, 136) The complaint also alleged that during the month of July 1944, the Under Secretary of War, the Honorable Robert P. Patterson, one of the appellees here, directed debtor customers of appellant (not the United States or any agency thereof) to pay into the Treasury of the United States the sum of $204,000. This sum represented the determination of the Under Secretary of War of excessive profits of $775,000 realized by appellant during the fiscal year ended November 30, 1942, less applicable tax credits. This sum was paid into the Treasury of the United States by debtor customers of appellant. (R. 137) The determination of excessive profits realized by appellant in the year 1942 was made pursuant to the provisions of the first act. The direction of the Under Secretary of War to make said payment and the actual payment was made *after* the enactment of the Renegotiation Act (February 25, 1944) and after appellant had filed in The Tax Court its petition for redetermination of alleged excessive profits for the year 1942. In the petition filed in The Tax Court appellant alleged the unconstitutionality of the first act under

which the determination was made, and alleged that if said act be constitutional, it had been applied in an unconstitutional manner to appellant's operations during the year 1942. That petition is still pending in The Tax Court.

The first act contained no provision for redetermination in The Tax Court, or for any review of the Under Secretary's determination. It was not until February 25, 1944, when the Renegotiation Act (the second act) was passed, that appellant had any statutory right to file a petition in The Tax Court for redetermination of asserted excessive profits for the year 1942.

The complaint alleged that $204,000 of appellant's funds had already been taken from it pursuant to an unconstitutional statute, the first act, and that this had been done while appellant was in good faith and in apt time contesting the validity of the Under Secretary's determination before the agency designated by the Renegotiation Act to make such a redetermination. (R. 137) The complaint alleged (R. 144), and the affidavit filed by the appellee Hirsch admitted (R. 118), that unless restrained by an injunction the appellees would do the same in connection with the 1943 determination as had been done in connection with the 1942 determination, namely, collect from customers indebted to appellant the sum of $270,000 (that being the amount of the determination of the War Contracts Price Adjustment Board for appellant's fiscal year 1943, after tax credits), regardless of the fact that appellant had also filed in The Tax Court its petition for redetermination pertaining to its fiscal year 1943, and regardless of the fact that in that petition appellant was asserting the unconstitutionality of the Renegotiation Act.

Other facts alleged in the complaint and admitted by the motion to strike are as hereinafter recited.

Aircraft and Diesel Equipment Corporation, appellant, operates a single manufacturing plant in the City of Chicago, Illinois, where, during the years 1942 and 1943, and in preceding and subsequent years, it manufactured and sold diesel fuel injection equipment, and aircraft engine precision parts. (R. 133, 134)

Following the close of its fiscal year, November 30, 1942, appellant filed with the War Department Army Air Forces, Midcentral Procurement District Price Adjustment Section at Chicago, Illinois, an agency designated by the Secretaries, its statement of sales, costs, taxes and profits and thereafter furnished additional data requested by such agency in respect of the business of the appellant during its fiscal year 1942 (December 1, 1941 to and including November 30, 1942). This data showed that during this period the company's total sales were $2,706,477.33, ($2,446,328.55 of which were determined to be subject to renegotiation by the administrative agency) and after deducting the cost of such sales and other expenses, but before federal taxes, the company's net profit was $940,-696.89. Appellant's income and excess profits taxes for the year were $683,255.41, leaving a net profit after taxes of $257,441.48. (R. 135)

On October 27, 1943, following conferences between appellant's officers and representatives of the Price Adjustment Board (another agency designated by the Secretary of War, but not the War Contracts Price Adjustment Board created by the Renegotiation Act), the appellee Patterson, then Under Secretary of War, purporting to act under powers delegated to him by the Secretary of War, under the first act made the "unilateral" determination as to excessive profits realized by appellant. In that unilateral determination order, Patterson recited that he had considered certain "financial operating and other

data, submitted by the contractor (appellant) or obtained from Governmental or other reliable sources relating to the profits realized by the contractor" and upon a consideration of that data, he determined that $775,000 of the profits realized by appellant during the fiscal year ended November 30, 1942 were excessive and should be eliminated. (R. 135, 170, 171) The nature of the data considered, other than that supplied by appellant, was and is unknown to appellant. The appellant requested that it be advised of the basis upon which such determination had been reached, but such information was denied. (R. 136, 172)

On February 25, 1944, the Renegotiation Act was passed, and pursuant to the provision of Section 403 (e) (2) of that Act, on May 18, 1944, appellant filed in The Tax Court of the United States its "Petition for Redetermination" of alleged excessive profits realized in the year 1942. In that petition appellant asserted the unconstitutionality of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942 as amended, and further asserted that if the act should be determined to be constitutional, it had been applied in an unconstitutional manner to appellant's operations in a number of respects, and particularly in that there had been included as a part of the sales subject to renegotiation, sales made prior to April 28, 1942 and sales made prior to and subsequent to April 28, 1942 on contracts made by appellant prior to that date. (R. 136-137)

On April 29, 1944, knowing that appellant proposed to file its said petition in The Tax Court of the United States for the year 1942, the appellee Patterson directed debtor customers of appellant (not the United States or any department, agency or instrumentality thereof) to with-

hold from appellant, and for the account of the United States, the sum of $204,000. (R. 137)

About July 19, 1944, *after* the "Petition for Redetermination of Profits" for the year 1942 had been filed in The Tax Court and while said petition was pending there (as it still is), the appellee Patterson directed debtor customers of appellant (not the United States or any department, agency or instrumentality thereof) to pay into the Treasury of the United States, the sum of $204,000. These customers made such payments of $204,000 into the Treasury of the United States. Appellant was thus deprived of funds which otherwise would have been paid to it, and to that extent its working capital was decreased and impaired. (R. 137)

Following the completion of its 1943 fiscal year (December 1, 1942 to November 30, 1943) appellant filed with the War Contracts Price Adjustment Board, Army Air Force Procurement Section, its statement of sales, costs, expenses and profits and thereafter filed with such agency such additional data pertaining to its operations as was requested. This data showed that during that period appellant's total sales were $3,548,845.50 and that the cost of manufacture of such articles was $2,155,375.14, leaving a net profit of $1,393,470.36 *before* taxes. Appellant's income and excess profits taxes for the year were $991,340.37, leaving a net profit after taxes of $402,129.99. (R. 137)

On or about January 11, 1945, after conferences in Chicago and in Washington (R. 139, 140) between officers of appellant and representatives of the War Contracts Price Adjustment Board, appellant received an "Order Under Delegated Authority Determining Excessive Profits made by the appellee Patterson, Under Secretary of War, purporting to act as the delegate of the War Contracts

Price Adjustment Board. (R. 140) In this order, Patterson recited that "there were submitted by the contractor (appellant) and obtained from governmental or other reliable sources, certain financial, operating and other data relating to the contractor's business and the contractor's profits," and upon such data, and after giving effect to all of the factors referred to in said section (a) (4) (A) of the Renegotiation Act, he had determined that of the profits of $1,393,470.36 *before* taxes, $1,265,000.00 represented excessive profits and should be eliminated. (R. 140, 168, 169) After the filing of the original complaint in this suit, appellant received a statement purporting to show the basis of the determination, a copy of which appears in the affidavit of Major George T. Wofford. (R. 119-124)

On February 28, 1945, appellant filed, in accordance with Section 403 (d) (5) of the Renegotiation Act, with the War Contracts Price Adjustment Board, its request to said Board to initiate a review of the determination of its delegate, Patterson. (R. 140)

On May 3, 1945, the War Contracts Price Adjustment Board entered an order refusing to initiate such review, and by said order adopted Patterson's order dated January 11, 1945 determining excessive profits for the year 1943 in the amount of $1,265,000. (R. 140, 141) In this order appellant was advised that the applicable tax credit was $994,235.28 and demand was made for the sum of $270,765.72 payable to the Treasurer of the United States, to be delivered to the Chairman of the War Contracts Price Adjustment Board at Washington, D. C. (R. 174)

On April 4, 1945 the appellant filed, pursuant to Section 403 (e) (1) of the Renegotiation Act, the "Petition for Redetermination" in The Tax Court of the United States

to redetermine excessive profits, if any, for the fiscal year 1943. In that petition appellant asserted the unconstitutionality of the Renegotiation Act, and further alleged that if the Act should be determined to be constitutional, it had been applied in an unconstitutional manner to appellant's operations for the year 1943. (R. 142)

To this petition in The Tax Court, the respondents filed a motion to dismiss on the ground that it was filed during the time when the War Contracts Price Adjustment Board might initiate a review. (R. 142) This motion was argued before The Tax Court on May 16, 1945 and taken under advisement by The Tax Court. At the time of the filing of the complaint in this cause, no order had been entered in The Tax Court on the motion to dismiss. Appellant alleged in its complaint that should The Tax Court sustain said motion and dismiss said petition on the ground that it was prematurely filed, it would immediately file a second petition within 90 days from the date of the order of the War Contracts Price Adjustment Board. A copy of said second petition then prepared and printed was attached to the complaint as Exhibit F. (R. 142, 175-192) The Tax Court on or about June 30, 1945, dismissed the petition filed April 4, 1945 on the grounds that it was filed during the time the War Contracts Price Adjustment Board might initiate a review. Appellant filed a second petition in The Tax Court on or about July 2, 1945, covering its operations during the year 1943, in which petition the same assertions were made as in the former petition in respect of excessive profits realized during its fiscal year 1943, which had been dismissed as being prematurely filed, namely, that the act was unconstitutional, but if it should be found to be constitutional, it has been applied in an unconstitutional manner. This second petition for the fiscal year 1943 is, with the petition for the fiscal year 1942, still pending and undisposed of in The Tax Court.

The complaint then alleged (R. 143) and the affidavit of Col. Maurice Hirsch, Chairman of War Contracts Price Adjustment Board, Appellee (R. 117, 118) admitted, that the War Contracts Price Adjustment Board would (as had been done in the 1942 renegotiation) direct debtor customers of appellant to pay into the Treasury of the United States, the amount of excessive profits determined by the War Contracts Price Adjustment Board to be due for the year 1943 less applicable tax adjustments.

The complaint then alleged that said directions would be given and collection made before the Tax Court of the United States could reach any decision upon appellant's pending petition for the fiscal year 1943. (R. 143, 144) The complaint alleged that this action would be taken, notwithstanding that the Renegotiation Act and Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942 (R. 145, 153, 159, 166) were, and each was repugnant to Article I, Section 1, and Article III, Sections 1 and 2, of the Constitution of the United States and to the Fifth, Seventh and Tenth Amendments to the Constitution.

It was also alleged that there was substantial doubt as to the right, power and jurisdiction of The Tax Court of the United States to pass upon the constitutionality of the Renegotiation Act since The Tax Court was an agency of the Executive Branch of the Government (Title 26 U.S. Code 1100). (R. 161) Further doubt was alleged as to whether The Tax Court would, under those circumstances, exercise such right even if it had the power to do so. It was also alleged that the right accorded the appellant by the Renegotiation Act, to file a petition for a redetermination of the amount due was and is, in so far as the question of the constitutionality of the act is concerned, a barren one and one which would serve no useful purpose. It is

then alleged that in addition, the act contained no provision in respect to repayment to the appellant of the difference between any lesser amount The Tax Court of the United States might determine to be due as excessive profits and the amount the Board had determined to be due, or for the payment of interest on such amounts as shall have been paid. (R. 161, 162)

It was then alleged that, unless the injunction be granted as prayed, appellant would suffer irreparable injury in that appellees would order customers of appellant to pay $270,000 into the Treasury of the United States which otherwise would be paid to appellant, and because it would (a) compel appellant to run the risk of subsequently impaired credit or insolvency of such of appellant's customers as made such payment; (b) impair and reduce appellant's working capital; (c) require appellant to select one of two courses, either refuse to ship to customers not paying appellant, or to make said shipments knowing its capital would be impaired; and (d) force appellant to sue the customers to collect the sums paid into the Treasury, with the resulting ill feeling and loss of good will. (R. 162)

The complaint then alleged that appellant was without a plain, adequate and complete remedy at law in that, (a) the taking of appellant's funds amounted to the illegal seizure of property; (b) that the remedy suggested, namely, a petition in The Tax Court, was inadequate and ineffectual because during the pendency of said petition, and irrespective of the decision in that court, appellant's moneys would be appropriated; (c) that the suit, if suit could be instituted in the Court of Claims, might not be within the jurisdiction of that court, and no recovery of interest could be had; (d) that actions against the several debtor customers who made payments would require ap-

pellant to institute a number of suits in different jurisdictions and that such multiplicity of suits would be costly and vexatious; and (e) that any recovery from customers must be after The Tax Court determination. This "remedy" would be offset by the inevitable loss of good will resulting from suits against customers. (R. 162-164) An affidavit filed herein shows that if the government attempted to collect by directing customers of appellants to pay into the United States Treasury sixteen or more customers would be affected. (R. 132)

The complaint also alleged that of the total sales of $3,548,845.50 made during the fiscal year 1943, $2,780,009.82 were pursuant to contracts between appellant and the purchasers, made prior to April 28, 1942, and that the sales made under such contracts in the fiscal year 1943 were not subject to renegotiation under the first act, (enacted April 28, 1942) or under the Renegotiation Act, the second act, (enacted February 28, 1944). (R. 152, 153) It further alleged that the Acts were and each was repugnant to the Fifth Amendment to the Constitution of the United States. (R. 153) Appellant also alleged that in the performance of said contracts made prior to April 28, 1942, it received from time to time, shipping instructions in the form of purchase orders and that sales of $175,423.71 were made in the year 1943 upon shipping instructions or purchase orders received prior to April 28, 1942. (R. 153, 154) It was also alleged that sales made pursuant to purchase orders received prior to April 28, 1942 were not subject to renegotiation under the first act, or the Renegotiation Act. (R. 154)

As applied to sales made during the year 1942 similar allegations were made, namely, that of the total sales of $2,706,477.33, sales of $1,886,770.00 were upon contracts made prior to April 28, 1942 between appellant and its

customers, (R. 157, 158) and that $1,625,023.65 of the sales made in 1942 were made pursuant to shipping instructions or purchase orders received prior to April 28, 1942. (R. 158) It was further alleged that the first act was repugnant to the Fifth Amendment to the Constitution.

As applied to renegotiation for the year 1943, it was expressly alleged that the enactment on April 28, 1942 of the Sixth Supplemental National Defense Appropriation Act, 1942, could not subject plaintiff's sales in the fiscal year 1943 to renegotiate under the provision of the Renegotiation Act, enacted February 25, 1944, almost three months after the fiscal year had terminated. (R. 155, 156)

SPECIFICATION OF ERRORS TO BE URGED.

1. The Court below erred in refusing to grant an interlocutory injunction restraining the enforcement, operation and execution of the Renegotiation Act. (Assigned as error No. 1.) (R. 449)

2. The Court below erred in not granting both a temporary injunction and a permanent injunction enjoining the defendants from carrying into operation their plan to cause customers of the plaintiff to withhold moneys otherwise due the plaintiff, and to order said customers to pay moneys owed to the plaintiff into the Treasury of the United States. (Assigned as error No. 5.) (R. 450)

3. The Court below erred in granting defendants' motion for a summary judgment and entering such judgment. (Assigned as error No. 8.) (R. 450)

4. The Court below erred in dismissing the Amended and Supplemental Complaint without a hearing on the merits. (Assigned as error No. 11.) (R. 450)

5. The Court below erred in not enjoining the defendants from carrying into effect their plan to cause customers of the plaintiff to withhold money due to the plaintiff and to cause such money due to the plaintiff in the aggregate amount of approximately $275,000.00, to be paid into the Treasury of the United States, prior to the time The Tax Court of the United States shall have made its redetermination in accordance with the provisions of the Renegotiation Act. (Assigned as error No. 13.) (R. 450, 451)

6. The Court below erred in holding that equity had no jurisdiction of the cause because the plaintiff had an adequate remedy at law. (Assigned as error No. 15.) (R. 451)

7. The Court below erred in holding that equity had no jurisdiction because no irreparable injury would result to the plaintiff if the relief prayed for, the issuance of a temporary injunction and a permanent injunction, were not granted. (Assigned as error No. 17.) (R. 451)

8. The Court below erred in holding that the suit was prematurely filed because administrative remedies afforded by the Statute are adequate. (Assigned as error No. 21.) (R. 451)

9. The Court below erred in dismissing the Amended and Supplemental Complaint without determining the questions of the constitutionality of the Renegotiation Act, (Assigned as error No. 23.) (R. 452)

10. The Court below erred in not holding that the Renegotiation Act is in violation of the Fifth Amendment to the Constitution of the United States in that it permits the taking of plaintiff's property without due process of law. (Assigned as error No. 26.) (R. 452)

11. The Court below erred in not holding that the

Renegotiation Act is unconstitutional in that by its terms it enables or permits administrative or executive officers of the United States to exercise the power to make laws, a power exclusively vested in The Congress of the United States under the provisions of Article I, Section 1, of the Constitution of the United States. (Assigned as error No. 28.) (R. 452)

12. The Court below erred in not holding that the Renegotiation Act is unconstitutional in that it enables or permits executive or administrative officers of the United States to determine that a liability on the part of a person to the United States exists, the amount of such liability, and authorizes such officers to collect the amount of such liability as so determined, all of which said functions are exclusively vested in the judicial branch of the Government of the United States by the provisions of Article III, Sections 1 and 2, of the Constitution of the United States. (Assigned as error No. 30.) (R. 453)

13. The Court below erred in not holding the Renegotiation Act is unconstitutional in that it deprives a person of a jury trial in a cause which the United States of America purports to have against such person, when the amount involved exceeds Twenty ($20.00) Dollars. (Assigned as error No. 32.) (R. 453)

14. The Court below erred in not holding the Renegotiation Act unconstitutional insofar as the effect of the provisions of Section 403 (c) (2) and 403 (e) (1) are concerned in that said Sections authorize administrative or executive officers of the Government of the United States to take a person's property before the administrative process by which the amount due to the United States from such person has been finally determined, in violation of the due process clause of the Fifth Amendment. (Assigned as error No. 33.) (R. 453)

15. The Court below erred in not holding the Renegotiation Act unconstitutional because it precludes in its terms any opportunity by the plaintiff to have a constitutionally organized court determine whether its property has been taken without due process of law in violation of the Fifth Amendment to the Constitution of the United States. (Assigned as error No. 34.) (R. 453)

16. The Court below erred in not holding the Renegotiation Act unconstitutional as violative of the Fifth Amendment to the Constitution of the United States in that it purports to authorize the taking of property which had vested in the plaintiff prior to the enactment of the Renegotiation Act. (Assigned as error No. 35.) (R. 453, 454)

17. The Court below erred in dismising the Amended and Supplemental Complaint without determining the questions of the constitutionality of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended prior to February 25, 1944. (Assigned as error No. 36.) (R. 454)

18. The Court below erred in not holding Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended prior to February 25, 1944, to be in violation of the Fifth Amendment to the Constitution of the United States in that it permits the taking of plaintiff's property without due process of law. (Assigned as error No. 39.) (R. 454)

19. The Court below erred in not holding that Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended prior to February 25, 1944, is unconstitutional in that it violates Article I, Section 1, of the Constitution of the United States by permitting executive or administrative officers to exercise legislati-

power vested exclusively in the Congress of the United States. (Assigned as error No. 40) (R. 454)

20. The Court below erred in not holding that Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended prior to February 25, 1944, is unconstitutional in that it enables or permits executive or administrative officers of the United States to determine that a liability on the part of a person to the United States, exists, the amount of such liability, and authorizes executive or administrative officers to collect the amount of such liability as so determined, functions which are exclusively vested in the judicial branch of the United States by the provisions of Article III, Sections 1 and 2, of the Constitution of the United States. (Assigned as error No. 43.) (R. 455)

21. The Court below erred in not holding that Section 402 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended prior to February 25, 1944, is unconstitutional in that it deprives a person of a jury trial in a cause which the United States of America purports to have against such person, when the amount involved exceeds Twenty ($20.00) Dollars. (Assigned as error No. 46.) (R. 455, 456)

22. The Court below erred in not holding Section 403 of the Sixth Supplemental National Defense Appropriation Act 1942, as amended prior to February 25, 1944, unconstitutional, because it precludes in terms, any opportunity by the plaintiff to have a constitutionally organized court determine whether its property has been taken without due process of law in violation of the Fifth Amendment to the Constitution of the United States. (Assigned as error No. 48.) (R. 456)

23. The Court below erred in not holding Section 403 of the Sixth Supplemental National Defense Appropria-

tion Act, 1942, as amended prior to February 25, 1944, unconstitutional as violative of the Fifth Amendment to the Constitution of the United States, in that it purports to authorize the taking of property which had been vested in the plaintiff prior to the enactment of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942. (Assigned as error No. 49.) (R. 456)

24. The Court below erred in not holding the Renegotiation Act and Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended prior to February 25, 1944, to be arbitrary, capricious, unequal in operation and in result in violation of the Fifth Amendment to the Constitution of the United States in that it purports to enable the taking of plaintiff's property without due process of law. (Assigned as error No. 51.) (R. 456, 457)

SUMMARY OF ARGUMENT.

This suit was instituted to restrain the collection of $270,000 alleged to be due from appellant upon a determination of excessive profits of $1,265,000 made by the War Contracts Price Adjustment Board for appellant's fiscal year 1943. The complaint alleged that the Renegotiation Act (the second act) in terms applicable to appellant's fiscal year 1943, and Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, (the first act) in terms, applicable to appellant's fiscal year 1942, were, and each was, in violation of the provisions of Article I and Article III of the Constitution of the United States, and in violation of the Fifth, Seventh and Tenth Amendments to the Constitution. The invalidity of the first act was asserted since under its provisions $204,000 due appellant had been paid into the Treasury

of the United States by appellant's customers in July 1944, pursuant to an order of the Under Secretary of War upon a determination of excessive profits of $775,000 made by him for appellant's fiscal year 1942.

If the first act be unconstitutional, or, the action taken was beyond the powers conferred by it, the $204,000 illegally collected should be set off against the $270,000, even if the second act be constitutional. If both acts be unconstitutional, as we contend, appellant will be entitled to payment of the $204,000 collected, but the complaint does not request repayment from the Government of said $204,000.

For each of the years 1942 and 1943, appellant has filed in The Tax Court of the United States its Petition For Redetermination as permitted by Sections (c) (1) and (c) (2) of the Renegotiation Act. Each of these petitions are still pending in The Tax Court.

The District Court did not pass upon the constitutionality of either act. Its order allowed appellees motion to dismiss, and for summary judgment upon the grounds that equity had no jurisdiction because, in the opinion of the Court, the appellant had adequate remedies.

I.

It is asserted by appellant, under Point I that both acts violate the provisions of Article I, Section 1 of the Constitution of the United States, vesting in the Congress all legislative power.

Under this subject it is asserted that while Congress may delegate to administrative agencies the "filling in of the details" it cannot delegate to such agency the legislative powers vested in Congress. Both acts provide that they shall commence operation, not upon the happening of any ascertainable event, but that they shall become

operative when in the "opinion" of the agency, excessive profits have or are likely to accrue. Under the first act, Section (c) (1) the opinion of the Secretary calls the Act into operation. Under the second act, Section (c) (1) the opinion of the War Contracts Price Adjustment Board does so. Under both acts the "opinion" is the sole requirement and nothing in either of the acts controls that opinion. There is no requirement that there be any finding of fact pursuant to which the act is called into operation as to any particular contractor, and the agency has never made such a finding of facts.

Under the first act, "excessive profits" are those profits which are found as a result of renegotiation to be "excessive." It is asserted that this definition, without any standards for the guidance of the administrative agency is so vague and uncertain as to render the act violative of Article I, Section 1 of the Constitution. In passing the second act the Congress recognized the absence of any standards in the first act. In the second act "excessive profits" are again defined as those profits which are determined to be excessive. In such determination, however, the War Contracts Price Adjustment Board is directed to take into consideration seven factors, one of which (the seventh) may be any additional factor the Board may adopt and publish. (Subsection (a) 4 (A)). None of the seven factors are objective. Each is subjective and dependent upon the individual opinion of the renegotiator. The so-called standards are not controlling or determinative. All that need be done, in the terms of the statute, is to take those factors into consideration.

Appellant asserts that the subject matter of the statute determines to a large extent the character and the certainty of the standards required to bring the law within the constitutional requirements. It is contended that where

Congress is enacting a statute which affects property rights of an individual the standards must be more specific than where, for example, the Congress is licensing an individual to do that which, prior to the enactment the individual could not do. In the second act the character of the factors affords no canalization of the acts of the administrative agencies, by which the Congress, the courts and the public can determine whether the agencies have kept within the mandate of Congress. In the second act the very factors set forth demonstrate that the Congress has abdicated the legislative powers conferred exclusively upon it by the Constitution. The factors named in the second act make the administration of that act as uncertain as the absence of any standards in the first act.

II.

Under Point II appellant asserts that both statutes are in violation of Article III, Sections 1 and 2 of the Constitution of the United States, defining the judicial power of the United States and vesting in the Courts of the United States exclusive jurisdiction in all cases and controversies therein named. Under this subsection it is asserted that both the first and second acts violate this Article of the Constitution, in that by the statutory provisions all judicial cognizance of the demands are taken from the courts and vested in administrative agencies. Under the first act the determination of the Secretary was final. No form of review of his determination was provided either before an administrative agency or a court. In the second act there appear four provisions which, if valid, effectively bar constitutional courts from any determination of this controversy between the Government and the individual. Those provisions are as follows:

1. Section (c) (1) provides that in the absence of the

filing of a petition in The Tax Court, as provided by (e) (1) the order of the Board shall be final and conclusive and shall not be subject to review by any court or agency.

2. Sections (e) (1) and (e) (2) grant to contractors, aggrieved by the determination of excessive profits made by the Board or the Secretary, the right to file a petition for redetermination in The Tax Court of the United States.

3. Section (e) (1) also provides that upon the filing of such petition The Tax Court shall have exclusive jurisdiction to redetermine the amount of excessive profits determined by the Board to be due and such determination shall not be reviewed or redetermined by any court or agency. Section (e) (2) by reference, in terms accomplishes the same result as to determinations which had been made by the Secretary under the first act.

4. Section (e) (1) also provides that the filing of the petition shall not operate to stay the order of the Board under (c) (2), that being the section giving the Board power to make its determination. Section (e) (2) by reference makes the same provision applicable to the orders of the Secretary under the first act.

In short, the acts, in terms, provide that the demand of the Government against a citizen shall not be tried in any constitutional court. If no petition for redetermination is filed, the determination of the Board or the Secretary is final and shall not be reviewed by any court. If a petition for redetermination is filed, The Tax Court shall have exclusive jurisdiction and its determination shall not be reviewed by any court. The Tax Court of the United States is a part of the executive branch of the Government and it does not have, nor can Congress vest in it, the functions of the judiciary. These sections of the statute deny to the judicial branch of government cogni-

zance of those matters which, in their nature, belong exclusively to constitutional courts. The framers of the Constitution made the judiciary independent that it might stand as a safeguard between the legislative or executive branches of the Government and the people. It was never intended that the Government could, as was done here, deprive an individual of property, without obtaining judgment or decree in a constitutional court. It is respectfully asserted that this type of claim for money, not taxes, must be determined in a constitutional court, and cannot be determined by an administrative agency. Illustrative of the hardship of any other rule are the facts in this case. The appellant pursuing its alleged "remedy" in The Tax Court, has exactions made against it before any determination is made in The Tax Court, and is then told that the equity courts of the United States cannot afford protection against the demands of the executive department of Government because the Congress so stated. Great as may be the powers of the Congress or of the Executive, they still can not take away from the individual the protection of the courts, established and guaranteed by the Constitution.

III.

Under Point III appellant asserts that both acts violate the Seventh Amendment to the Constitution of the United States which assures to the individual a trial by jury in suits at common law where the amount in controversy exceeds Twenty Dollars.

From the literature surrounding the adoption of the Constitution and the first ten amendments it appears that the colonists were not satisfied alone with the provision for an independent judiciary. They demanded an amendment assuring to themselves the right of trial by jury in

civil cases. This demand was embodied in the Seventh Amendment. The claim of the Government considered here is a claim for money, not taxes. The only legal mode of the enforcement of such a claim is by resort to a court of law. No legislation enactment can transfer the property of an individual to the Government without payment therefor. If this alleged claim of the United States is cognizable only in a court of the United States, then in such a case appellant is entitled to a trial by jury, guaranteed by the Seventh Amendment.

IV.

Under Point IV it is asserted that both acts violate the due process clause of the Fifth Amendment to the Constitution of the United States.

It is first asserted that both acts are invalid because they do not afford appellant a trial in a constitutional court.

It is next asserted under this subsection that the failure of both acts to provide some form of judicial review of the determination of the War Contracts Price Adjustment Board and of the redetermination of The Tax Court, violates the due process clause, since, regardless of what it may be called, the claim asserted by the Government is claim for money against a citizen, in the determination of which the citizen is entitled, if not to a regular trial in a constitutional court, to at least a review of the matters in issue by a constitutional court. It is also asserted under this point that the very provisions of the act, purporting to deny to this Court the right to determine the constitutionality of the acts are, independently of all other reasons a denial of due process.

It is next asserted that the denial of due process is

apparent from an appraisal of the totality of the facts in this case. Both acts are again reviewed to demonstrate that the acts and the individual sections constitute a denial of fundamental fairness shocking to a universal sense of justice.

In the argument on the totality of the facts attention is directed to the first and second acts separately. Under the first act, Section 403 (b) and 403 (c), contracts not in excess, in the aggregate, of $100,000 were exempt. Under the second act, Section (c) (6), contracts not in excess, in the aggregate, of $500,000 were exempt. Under the first act, Section 403 (i) (1) contracts for the products of a mine, well or mineral deposit not processed beyond the first stage, were exempt. Under the second act, Section (i) (1), the same exemption was repeated and four other exemptions were added. Under the first act, Section 403 (i) (2), the Secretary was given the right to exempt other contracts. Under the second act, Section (e) (4), the Board was given power to exempt other contracts falling into six named classes. There appears no logical basis for the lack of uniformity, either in the amount or in the classification, and it is asserted that the classification is entirely arbitrary and of the type condemned by this Court.

Section 403 (c) (1) of the first act provides for the operation of the statute when the Secretary shall be of the opinion that excessive profits have been, or are likely to be, realized. The same section (c) (1) of the second act substitutes the opinion of the War Contracts Price Adjustment Board for that of the Secretary. It provides that when the Board is of such opinion the statute becomes operative. There is discussed under this caption the fact that equal prices could be charged, and equal profits realized, but in one case the statute would commence to operate because of an opinion, while in the other, where no

opinion was expressed, or an opinion expressed that excessive profits had not been realized, the statute would be inoperative.

"Excessive profits" are defined under the first act, Section 403 (a) (4), as those determined to be excessive. Under the second act, Section (a) (4) (A), substantially the same language is used but the Board is directed to take into consideration seven named factors, all of which factors are subjective only. It is then asserted that neither act contains definite standards for the guidance of the agency as required by the decisions of this Court.

Under the first act, Section (c) (1) excessive profits could be determined only upon agreement of the Secretary with the contractor. The Secretary of War ignored this provision of the act and made his own determination when the contractor refused to agree. Under the second act, Section (c) (1), the Board was directed to invite the contractor to a conference, but if the contractor failed to acquiesce in the opinion of the Board, the Board was authorized to enter an order determining the amount of excessive profits. The necessity of an agreement vanished. Under the language of the first act, there was no provision for any review or appeal. The second act contained provisions for a redetermination in The Tax Court of any determination made by the Secretary under the first act, and for redetermination of any determination made by the Board under the second act. Sections (c) (1) and (e) (1) of the second act, in terms, divested courts of any jurisdiction to protect the contractor or subcontractor. The sections mentioned above conferred only a sterile right to file a petition. Although the petition may ultimately lead to a redetermination of a lesser amount of excessive profits or none, by The Tax Court, collection of money due to the contractor or subcontractor may be made by the administrative agency pending the redetermination, by

directing customers of subcontractor to pay money owed it into the Treasury of the United States. This collection is made upon a determination of the War Contracts Price Adjustment Board before any hearing has been accorded. The order is based upon data which at least in part, the contractor or subcontractor has never seen. There is no provision in either of the acts to refund to contractor or subcontractor any money which may have been paid into the Treasury of the United States in the event the acts are invalid, or if valid, to refund the difference between the Board's determination and the amount determined by The Tax Court to be due.

Appellant contends that the acts are repugnant to the due process clause of the Fifth Amendment insofar as they are retroactive.

The first act, passed April 28, 1942, purports to apply to all contracts made prior to that date unless full payment was made prior to April 28, 1942. Appellant had numerous contracts made prior to April 28, 1942, upon which payment was made prior to and subsequent to April 28, 1942. The Board treated all the sales of appellant regardless of the date of the contract, or of payment as being renegotiable. It is asserted that all contracts made prior to April 28, 1942, are not subject to diminution by any subsequent statute. The second act, enacted February 25, 1944, purports to apply to all contracts, to the extent of the amounts received therefrom in any fiscal year ending after June 30, 1943, whether such contracts were made on, after or prior to February 25, 1944. (Section (c) (6))

Appellant contends that the second act enacted February 25, 1944, cannot apply to appellant's fiscal year 1943, which had ended November 30, 1943. It is also asserted that any sales upon contracts made prior to April 28, 1942, are not subject to renegotiation under either act.

Appellant contends that the totality of the facts in this case demonstrate that in the administration of the acts, appellant has been dealt with in a manner which shows a denial of fundamental fairness, shocking to a universal sense of justice.

V.

All of the foregoing argument (Points I, II, III and IV) has been made upon the assumption that the renegotiation acts constitute legislation which if not invalid for the reasons heretofore given, is within the "war powers" as delegated to the Congress under Article I of the Constitution of the United States.

Under Point V appellant asserts that both acts are violative of the Tenth Amendment to the Constitution, which reserves to the States or to the people, the powers not expressly delegated to the Federal Government. It is our position that the renegotiation acts are not within the "war powers" of the Congress and cannot be supported as an exercise of such powers. It is asserted that there is no relation between the war powers, and legislation which purports to allow an administrative agency to determine the profits which a contractor may retain. In that discussion it is admitted that the power to wage war necessarily implies the power to wage war as effectively and as cheaply as possible, but a distinction is made between *cost* to the government and the *profits* which the contractor may realize. It is not contended that the government may not fix prices of war materials which it purchases, but it is contended that the control of the profits a contractor may make after selling at such prices is not within the "war powers" of the Federal Government. It is also contended that the exemption from renegotiation of contractors and subcontractors who did

not do a volume of $500,000 under the second act, or a volume of $100,000 of business under the first act, creates, not an aid to the successful prosecution of the war, but on the contrary, creates a deterrent to it. Similarly it is contended that the other exemptions specified by the acts as well as the permissive exemptions from renegotiation were not only detrimental to the successful prosecution of the war, but showed a partiality and absence of uniformity which rendered the statute invalid. It is contended that the renegotiation acts are in fact recognition of a social philosophy which may be admirable but which goes beyond the powers granted to the Federal Government.

VI.

Following the discussion of the invalidity of the two acts, it is asserted under Point VI that the appellant will suffer irreparable injury if the injunction be denied.

It is admitted that unless the injunction issue, appellees will exact from customers of appellant $270,000 in addition to the $204,000 already exacted. This additional amount will be exacted before The Tax Court shall have passed upon either the determination of the Secretary for 1942, or of the Board for 1943, and before any determination is made by this Court, as to the constitutionality of either act. The deprivation of $474,000 to a small company whose total sales in 1943 were only $3,500,000 constitutes a serious impairment of its working capital. In addition the acts contain no provision for the recovery of said sum in the event the acts be determined to be unconstitutional, or if determined to be constitutional that it subsequently appear by the action of The Tax Court that the determination made by the Secretary in 1942, and by the Board in 1943, were greater than they should have been.

In addition to there being no provision for recovery, there is no recovery procedure established, and there is no provision for the payment of interest to appellant.

If appellant be correct in all its contentions, unless the injunction be granted, appellant must see its working capital diminished by $474,000, must then await action by The Tax Court (it has now waited over two years on the 1942 petition) and must then determine at its own risk and without any statutory authority, a procedure for the recovery of the funds unlawfully collected. In addition even if successful, it cannot be assumed that funds will be appropriated for repayment, or if appropriated, provision will be made for the payment of interest.

The District Court determined that equity has no jurisdiction because of the adequacy of three alleged remedies, (a) the petition in The Tax Court, (b) suit in the Court of Claims, and (c) suits against the customers of appellant who have made or will make payments upon the direction of appellees.

From what has been said before it is apparent that the suggested "remedy" by petition in The Tax Court is wholly inadequate. In fact, it is a hindrance rather than a help. It does not, and cannot restrain collection. It does not permit the entry of an order that the funds so collected shall be repaid. It does not permit a determination by this Court of the constitutionality of the acts, which this Court alone can determine. In connection with the "remedy" by petition in The Tax Court, it has been asserted by appellees that until the administrative remedy be exhausted no other procedure can be invoked. This assertion fails to recognize that the doctrine of the exhaustion of administrative remedies has no application to the kind of a case where the impact of the statute is felt before the administrative procedure has

run its course and issued its final command. It also ignores the fact that appellant has already done all that it can do with the administrative remedy; has in fact exhausted it, and that further action in that direction can be only submission to the agency's orders.

Appellant does not have any remedy, adequate or otherwise, in the Court of Claims. There is no statutory provision for a remedy in that court, but there is an express statutory provision in the acts themselves precluding the Court of Claims, or any other court, except The Tax Court from acting in renegotiation matters. There is no general power in the Court of Claims to decree the payment of interest. Even if there should be a right in the Court of Claims by which appellant could recover the amounts illegally collected, that right could only be exercised *after* The Tax Court shall have made its determination of excessive profits, if the acts be constitutional, or *after* the decision in this Court that the acts are or either of them is unconstitutional.

Appellant does not have any adequate remedy by suits against its customers for the amount they may be requested to pay into the Treasury of the United States. This so-called "remedy" is worse than the injury it is supposed to cure. Under this suggestion, *after* appellants' customers have complied with the orders of the Under Secretary of War or the Board, and have paid into the Treasury of the United States the amounts demanded, they must be sued by appellant for the amounts so paid, to test the constitutionality of the acts.

These customers did not deny their indebtedness to appellant, and would have paid it except for the orders of the Under Secretary of War. They are, however, opposed to any procedure by which they are made defendants in a suit in which they have no interest, solely because in such a procedure the validity of the acts of others may

be determined. Suing them will result in the discontinuance of business with appellant.

If the appellees' actions were erroneous, or if the acts are unconstitutional, such issues can be determined in this suit between appellant and appellees without requiring disinterested persons to become involved, to the further injury of appellant.

In addition to the destruction of business relations, the suggested application of this remedy overlooks the number of suits required, the costs and expenses which appellant will be forced to incur, and the time lost by appellants' executive and clerical staff in suing its several customers.

ARGUMENT.

I.

THE FIRST AND SECOND RENEGOTIATION ACTS VIOLATE THE PROVISIONS OF ARTICLE I, SECTION 1 OF THE CONSTITUTION OF THE UNITED STATES.

Article I, Section 1 of the Constitution of the United States provides as follows:

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

It is recognized that this power admits the enactment of laws having reasonably broad scope, outlining the legislative policy, or the end to be achieved, and leaving to the agency to which the administration of the act is committed the power to fill in the details. It is also recognized, as this Court said in *Addison* v. *Holly Hill Co.*, 322 U.S. 607, that the wider a delegation is made by Con-

gress to an administrative agency, the more incomplete is a statute, and therefore the ampler the scope for filling in the details. This does not mean, however, that there need be no definite standard or guide for the action of the administrative agency. As is illustrated by the decisions of this Court, the nature of the standards must depend upon the function of the legislation, and its effect. Numerous cases have been before this Court in which attacks have been made against the validity of the legislation because of the lack of adequate standards. The nature of the legislation and the character of the standards varies so widely that but little direct comparison can be made. In *Panama Refining Co.* v. *Ryan*, 293 U.S. 388; *Schechter Corp.* v. *United States*, 295 U.S. 495; *Carter* v. *Carter Coal Co.*, 298 U.S. 238 and *United States* v. *Cohen Grocery Co.*, 255 U.S. 81, the standards were held to be inadequate. In each of those cases, the statute or portions thereof under consideration were held to be unconstitutional. In *United States* v. *Rock Royal Co-op.*, 307 U.S. 533; *Mulford* v. *Smith*, 307 U.S. 38; *Sunshine Coal Co.* v. *Adkins*, 310 U.S. 381; *Opp Cotton Mills* v. *Administrator*, 312 U.S. 126, and *Yakus* v. *United States*, 321 U.S. 414, the standards or guides were held to be adequate. In those cases the statute under consideration or the portions attacked were held to be constitutional.

This Court has consistently taken the position that the function of the law questioned, determines to a great extent the character of standards required. Where the court has dealt with a statute which involves the granting of congressional sanction, this court has been liberal in its requirements in respect of standards. Thus, where the act deals with matters regarding licenses, which could be and historically were granted by Congress out of hand, there seems little reason why a standard more specific than the "public interest" should not satisfy the constitutional requirement. This principle is illustrated by the

cases of *N. Y. Central Securities Co.* v. *U. S.*, 287 U.S. 12 (unification of control of railroads), *National Broadcasting Co.* v. *U. S.*, 319 U.S. 190 (control of broadcasting) and *United States* v. *Grimaud*, 220 U.S. 506 (use of public domain). *Hampton & Co.* v. *United States*, 276 U.S. 394 (imports). *American Power & Light Co.* v. *Securities and Exchange Commission*, 328 U.S.—(decided November 25, 1946) 15 LW. 4013)

When, however, the Court is dealing with matters which relate to the liberty or the property of an individual, it has taken a very different position. In those cases, this court has always held that the standards required should be consonant with the inviolability of the rights involved and has required that standards of objectivity be set forth which ensure that the administrative agency cannot act on its own whim. This principle is illustrated by the following cases: *United States* v. *Cohen Grocery Co.*, 255 U.S. 81; *Carter* v. *Carter Coal Co.*, 298 U.S. 238; *Schechter Corp.* v. *United States*, 295 U.S. 495; *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 and *Yakus* v. *United States*, 321 U.S. 414.

Much of the great legislation which has been passed since the early 1930's, and which relates to property rights has provided (in addition to affording court review) objective standards which could and did keep the administrative agency canalized in the administration of the act so that the "Congress, the courts and the public", could ascertain from examination of their proceedings and their determinations whether they have kept within the Congressional mandate. *Addison* v. *Holly Hill Co.*, 322 U.S. 607. Whenever the Congress gave to an administrative agency which dealt with liberty or property "a roving commission" or did not provide objective standards, this court, consonant with its privilege and duty to safeguard

the individual in protecting his liberty or his property has either struck the statute down or so construed it that the individual could be assured due process of law. (*Panama Refining Co.* v. *U. S.*, 293 U.S. 388; *United States* v. *Cohen Grocery Co.*, 255 U.S. 81; *Carter* v. *Carter Coal Co.*, 298 U.S. 238). This is particularly true if the statute in question makes no provision for court review. (*American Power & Light Co.* v. *Securities and Exchange Commission*, 328 U.S. ..., (decided November 25, 1946) 15 LW. 4013, 4017.

If any general summary can be made as to whether the delegation of power to an administrative body is within the limits required, such summary would present three requirements.

First: There must be a definite statement of the legislative policy or purpose in the act, or determinable from it.

Second: If the operation of the act is dependent upon the existence of certain ascertainable facts, there must be a statement in the act setting forth the facts upon the occurrence of which it shall become operative.

Third: The act must prescribe methods to be followed by the agency to which the administration of the act is entrusted, by which Congress, the courts, and the public can determine whether the agency has acted within the limits prescribed by Congress.

In the light of the foregoing observations both acts are lacking in all of the essentials.

(A) The First Act, Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942.

Before discussing the constitutionality of the first act, it is pointed out that appellant does not agree with the construction placed upon the first act by the Secretaries. As construed by them, the first act permits them, in the absence of agreement as to excessive profits, to make a "unilateral" determination. Notwithstanding our contention that the plain words of the act authorizes nothing, in the absence of agreement, but that the contractor or subcontractor be required to "renegotiate", we discuss the constitutionality of the first act as if the construction of the Secretaries is the correct one.

There is no definite statement of legislative policy or purpose contained in the act itself.

The act becomes operative upon an individual, not upon the occurrence of any ascertainable event, but when the Secretary is of the "opinion" that the profits realized or likely to be realized may be excessive. Section 403 (c) (1) provides in part as follows:

> "Whenever, in the opinion of the Secretary of a Department, the profits realized from any contract with such Department or from any subcontract thereunder whether or not made by the contractor, may be excessive, the Secretary is authorized and directed to require the contractor or subcontractor to renegotiate the contract price."

Two contractors, one of which may be appellant, may make identical articles, charge identical prices, have identical costs, realize identical gross profits, pay identical Federal taxes and realize identical net profits, but because the Secretary is of the opinion that Aircraft's profits are excessive the statute commences operation on Aircraft. Because the Secretary is of the opinion that Contractor B

(not Aircraft) did not realize excessive profits, or because the Secretary has failed to form an opinion on the subject, the statute does not operate upon Contractor B. Nothing determines the calling of the statute into operation except "the opinion" of the Secretary. Nothing in the statute controls the opinion of the Secretary. This type of legislation, where the operation of the statute was dependent upon an opinion without factual basis therefor, was held to be unconstitutional in *Panama Refining Co.* v. *Ryan*, 293 U.S. 388; *Wichita Railroad & Light Co.* v. *Public Utilities Comm'n*, 260 U.S. 48, 59; *Mahler* v. *Eby*, 264 U.S. 32, 44.

The statute is now in operation as to Contractor A (Aircraft) but not in operation as to Contractor B. As to Contractor A, the Secretary is directed to eliminate any excessive profits. What are the excessive profits to be eliminated? Section 403 (a) (4) provides as follows:

> "The term 'excessive profits' means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits."

Appellant has never been a party to any agreement with the Secretary or any delegate thereof, recognizing that any portion of its profits have been found as a result of renegotiation to represent excessive profits. Appellant has consistently maintained that it realized no excessive profits. As the act is construed by the Secretaries, the determination of a realization of excessive profits may be made solely by the Secretary. The Secretary's uncontrolled opinion brought the act into play. The Secretary's uncontrolled opinion alone determined the amount of excessive profits. No standard, guide, factor or other yard stick for that determination is provided in the act. This is more than allowing the administrative agency "to fill in the details." This is transferring to the administra-

tive agency the legislative functions of the Congress of the United States. Undefined, unrestricted and subject to no form of review, it represents the complete abdication by Congress of the legislative functions vested in the Congress by Article I, Section 1 of the Constitution of the United States.

Assuming that this court could agree as to what Congress meant when it used the words "excessive profits" and the contention was made that the Secretary did not properly construe the Act, there is nothing in the act or in the Secretary's proceeding by which this court could determine whether the Secretary had kept within the act.

It was under this act that $204,000 of appellant's funds were paid into the Treasury of the United States by debtor customers of appellant pursuant to the order of the Secretary of War.

(B) The Second Act, the Renegotiation Act.

On February 25, 1944, the Renegotiation Act was passed, as a part of the Revenue Act of 1943. It purports to apply to appellant's fiscal year 1943. This act while attempting to correct some of the glaring deficiencies of the first act likewise fails to satisfy the requirements of Article I, Section 1 of the Constitution of the United States.

Neither in the Revenue Act of 1943, or in the section designated as the Renegotiation Act, is there any statement of legislative policy.

This act is effective as to a particular individual, not upon the occurrence of any ascertainable event, but whenever the War Contracts Price Adjustment Board is of the "opinion" that the amounts received or accrued under

contracts may reflect excessive profits. Section (c) (1) of the Renegotiation Act provides in part as follows:

> "Whenever, in the opinion of the Board, the amounts received or accrued under contracts with the Departments and subcontracts may reflect excessive profits, the Board shall give to the contractor or subcontractor as the case may be, reasonable notice of the time and place of a conference to be held with respect thereto. The mailing of such notice by registered mail to the contractor or subcontractor shall constitute the commencement of the renegotiation proceeding."

The statute commences to operate not upon the happening of an event, not upon any definite objective, but when the Board is of the opinion that the amounts received or accrued upon contracts may reflect excessive profits. Again, two contractors may make identical articles, charge identical prices, have identical costs, realize identical profits, before and after taxes, but because of the opinion of the Board the statute operates only upon Contractor A (Aircraft) and not upon Contractor B.

This act provides, Section 403 (c) (1) that if the Board does not make an agreement with the contracter for the elimination of excessive profits, the Board shall issue and enter its order determining the amount of such excessive profits and give notice thereof to the contractor. Gone now is any pretense of real renegotiation. If no agreement is reached the Board makes an order determining the amount of excessive profits. The Board may request an agreement, but if the contractor does not accept the determination of the Board, whatever it may be, it is immaterial. The Board then issues its order determining the amount which in its opinion represents excessive profits and then proceeds to collect this amount from customers of the contractor.

But recognizing one of the glaring deficiencies of the first act, and in so recognizing it, admitting its invalidity, the Renegotiation Act purports to contain seven factors to be taken into consideration in determining excessive profits. Section (a) (4) (A) provides:

> "(4) (A) The term 'excessive profits' means the portion of the profits derived from contracts with the Departments and subcontracts which is determined in accordance with this section to be excessive. In determining excessive profits there shall be taken into consideration the following factors:
>
> (i) efficiency of contractor, with particular regard to attainment of quantity and quality production, reduction of costs and economy in the use of materials, facilities, and manpower;
>
> (ii) reasonableness of costs and profits, with particular regard to volume of production, normal prewar earnings, and comparison of war and peacetime products;
>
> (iii) amount and source of public and private capital employed and net worth;
>
> (iv) extent of risk assumed, including the risk incident to reasonable pricing policies;
>
> (v) nature and extent of contribution to the war effort, including inventive and developmental contribution and cooperation with the Government and other contractors in supplying technical assistance;
>
> (vi) character of business, including complexity of manufacturing technique, character and extent of subcontracting, and rate of turnover;
>
> (vii) such other factors the consideration of which the public interest and fair and equitable dealing may require, which factors shall be published in the regulations of the Board from time to time as adopted."

None of the foregoing factors is objective. There is no definite starting point and even after starting there is no guide. In *Standard Chemicals & Metals Corp.* v.

Waugh Chemical Corporation, 131 N.E. 566, 567, discussing the Lever Act, Mr. Justice Cardozo said:

> "The act, as the Supreme Court construes it, rejects all objective standards, all determinate or determinable criteria, the tests of practice or precedent or the market or the vicinage. Rejecting these, it sets the individual adrift upon the uncharted sea of subjective prejudice and favor."

How aptly that observation applies to the Renegotiation Act.

This act, while purporting to supply standards, supplies only vague and indefinite words, under which neither the court, the individual, nor the Congress could determine whether the agency had kept within the congressional intent, if the Congressional intent could be determined.

It is under this statute that appellees assert that they will take an additional $270,000 of appellant's funds.

In a consideration of both acts, it may be asserted that excessive profits are incapable of more exact determination. If such contention be made, it will be an admission of the absence of any standards in the first act. It will also, be an admission that the alleged standards in the second act are insufficient and fatally defective. But a contention that the words "excessive profits" are incapable of a better definition is unsound. In the Internal Revenue Code, sections 713 and 714, a tax is imposed upon excess profits and neither the Government, the tax payer, nor the courts have had any great difficulty in applying the formula contained in that act. Average earnings over the base period which are not subject to excess profits tax have an exact and certain meaning. Earnings above the average earnings for the base period are defined as excessive profits and are taxed as such. The Internal Revenue Code also provides that in determining excess

profits one may use a percentage of the average invested capital over the base years. No difficulty has been encountered in determining excess profits under this second formula.

The two formulae in the Internal Revenue Code are generally well understood and they could have been used in determining excessive profits under the Renegotiation Act. In their use, there would have been no uncharted seas on which the administrative agency was cast adrift. If variations from the fixed formula were desirable, resort could have been had to similar language as that contained in the relief section, Section 722, of the Revenue Code, pertaining to special circumstances. The use of either formula, however, would have produced and insured a definite result, from which additions to, or deductions from, could easily have been made as circumstances required. The Vinson Act also provided a means of determining excess profits based upon a percentage of the profits. c. 95, 48 Stats. 503, and amendments thereto.

Failure to provide definite standards is evidence that the framers of the act intended to vest solely in the administrative agencies the absolute power of arbitrary determination of what constituted excessive profits.

But the Congress, even had it intended and desired to do so, could not abdicate its functions and delegate to administrative agencies the uncontrolled power to determine excessive profits. This delegation is expressly prohibited by the provisions of the Constitution of the United States. In *Yakus* v. *United States*, 321 U.S. 414, involving the validity of the Stabilization Act, the administrator was directed to the prices prevailing between October 1 and 15, 1941. A similar direction in the Renegotiation Act or in the prior act as to a price date, or even a period of profits, would have furnished some basis for

the determination of excessive prices or excessive profits. One could give consideration to all of the factors contained in the second act, even including the power of the Board to adopt additional factors, (factor vii) could grade the contractor 100% on each of those factors, including factor vii, and yet be without a basis for determining excessive profits. Normal or reasonable profits are not defined.

When Congress passes any act which in its terms gives to an administrative agency the power to define the extent of its own powers as it did here in directing the agency to eliminate excessive profits and defining excessive profits as those found by the agency to be excessive, it runs counter to the recognized principle of constitutional law recently stated in this language:

> "The determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom the authority is vested." *Addison* v. *Holly Hill Company*, 322 U.S. 607, 616.

If an endeavor be made to determine from the words themselves what the Congress meant by the use of the words "excessive profits" two possibilites are immediately suggested, first, that the Congress meant profits in excess of normal war time profits, second, that the Congress meant profits in excess of the profits which would have been realized except for war.

If the first possible meaning be considered, it is apparent that the Congress left far too much for the determination of the Board and of The Tax Court. In *United States* v. *Cohen Grocery Co.*, 255 U.S. 81, this Court held that the language of the statute, directed against an "unjust or unreasonable rate or charge" was too indefinite to satisfy the constitutional requirements. In that case, the opinion of this Court shows that seven different judges of seven different districts had different ideas as to what con-

stituted an "unjust or unreasonable rate or charge." Yet, as is evidenced by a study of their charges to their juries, each was earnestly desiring to state the meaning of the words to properly administer the act. In the opinion of this Court (pp. 90-91) attention was also directed to the fact that administrative officers had made "persistent efforts . . . to establish a standard of their own to be used as a basis to render the section possible of execution." But neither the persistent effort of the administrative officers or the earnest desires of the several judges could overcome the indefinite language used in the act.

In *Weeds, Inc.* v. *United States,* 255 U.S. 109, 110, 111, this court considered an indictment which charged a conspiracy to exact "excessive prices." In deciding that case on the authority of the *Cohen* case, this court said:

> "As the only difference between the charges in the *Cohen Grocery Co. Case, ante,* 81, and those in this is the fact that here, in one of the counts, there was a charge of conspiracy to exact excessive prices, it follows that the ruling in the *Cohen Case* is decisive here unless the provision as to conspiracy to exact excessive prices is sufficiently specific to create a standard and to inform the accused of the accusation against him, and thus make it not amenable to the ruling in the *Cohen Case.* But, as we are of the opinion that there is no ground for such distinction, but, on the contrary, that the charge as to conspiracy to exact excessive prices is equally as wanting in standard and equally as vague as the provision as to unjust and unreasonable rates and charges dealt with in the *Cohen Case,* it follows, for reasons stated in that case, that the judgment in this must be reversed and the case remanded with directions to set aside the sentence and quash the indictment."

If, however, the opinions of the Court in the *Cohen Grocery Co.* case and in the *Weeds, Inc.,* case, holding the

words "unjust or unreasonable rate or charge" and the words "excessive prices" to be too indefinite, be rejected, for the reasons given by Mr. Justice Pitney and Mr. Justice Brandeis, additional difficulties are encountered. Mr. Justice Pitney and Mr. Justice Brandeis found no difficulty in determining what excessive prices were. Mr. Pitney said: (p. 112)

> "In the absence of a statutory definition of, or method of determining, standard prices, with which to compare the prices alleged to be excessive, the natural standard, according to which this provision of the act ought to be interpreted, is that adopted in the ordinary transactions of men, and adhered to by the common law time out of mind—the standard of fair market value: the price prevailing under current conditions of supply and demand, uninfluenced by manipulation."

The statute in those cases referred to *excessive prices*, and Mr. Pitney and Mr. Brandeis were of the opinion that by using such language excessive prices, Congress meant those which exceeded, the fair market value—the price prevailing under current conditions of supply and demand, uninfluenced by manipulation.

But the renegotiation acts reject standards which "have been adhered to by the common law time out of mind—the standard of fair market value." The renegotiation acts reject any and all determinative standards.

If, as appears from the foregoing decisions the terms "excessive prices" are so lacking in specificity as to render them violative of Article I, Section 1 of the Constitution, the term "excessive profits" cannot be said to have the requisite specificity. So far as we are aware, unlike the situation which Mr. Justice Pitney described, in respect to "excessive prices," there is no standard which may be borrowed from the common law in respect of what "ex-

cessive profits" are. Certainly the acts do not purport to borrow such standard from the common law.

Considering the second possibility, that the Congress meant by the term "excessive profits", those profits in excess of the profits the contractor would have earned, if there were no war, it is sufficient to say that this assumption would necessarily render the renegotiation acts unconstitutional on the authority of *International Harvester Co.* v. *Kentucky*, 234 U.S. 216, in which this Court said, speaking through Mr. Justice Holmes: (pp. 223, 224)

> "To divine prophetically what the reaction of only partially determinate facts would be upon the imaginations and desires of purchasers, is to exact gifts that mankind does not possess."

In the case of *International Harvester Co.* v. *Kentucky*, 234 U.S. 216, the court was dealing with the subject of prices. If divining prices prophetically exacts "gifts mankind does not possess," it can be said that any attempt to divine what "excessive profits" might have been under conditions which do not exist, requires no lesser gifts. Obviously this is true because the term "profits" alone involves many matters not involved in the establishment of prices.

Whatever assumption or assumptions be made as to the intent of the Congress in use of the terms "excessive profits," the fact is that there are no standards for the determination. If the first act should be construed, as the Secretaries have construed it, the only plausible explanation for the arbitrary provisions in the acts is that they were intentionally drafted so that no standard was required, except the individual will of the renegotiator. That was made plain in the hearings on the bills in Congress from which the second act emerged. Mr. Maurice Karker, representing the War Department before the

Ways and Means Committee said that the factors taken into consideration by the War Department in renegotiation were "multitudinous". (p. 72, Renegotiation of War Contracts, Hearings before the Committee on Ways and Means, House of Representatives, Seventy-Eighth Congress, First Session on H.R. 2324, 2698 and H.R. 3015, etc.) On page 108 of the same report of these hearings, Mr. Karker, stated that there were no means of determining what excessive profits are except the judgment of the man who is handling the job, and that the determination of excessive profits was a personal judgment, not according to any statute or formula.

Attorneys for the appellees, in the court below stated: (page 20 of their brief)

> "The statute as thus enacted did not contain any detailed definition of excessive profits nor any formula pursuant to which the computation of excessive profits was to be made. The determination was to be by an exercise of judgment by the administrative officers."

It will be observed that the appellees propose to deprive the appellant of its property, not upon any statement of law, but upon their own individual judgment.

In the case of *United States* v. *Cohen Grocery Co.*, 255 U.S. 81, 89, this court said:

> "The sole remaining inquiry, therefore, is the certainty or uncertainty of the text in question, that is, whether the words 'That it is hereby made unlawful for any person wilfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries,' constituted a fixing by Congress of an ascertainable standard of guilt and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not, we are of opinion, so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary. Observe that the section forbids no specific or

definite act. It confines the subject matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below, in its opinion, to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury."

If it be suggested that these decisions cited above apply only to criminal cases, attention is directed to the fact that the principles of those cases were reaffirmed by this Court in civil cases. *United States* v. *New River Collieries*, 262 U.S. 341; *Davis* v. *Newton Coal Co.*, 267 U.S. 292; *Small* v. *American Sugar Ref. Co.*, 267 U.S. 233.

The observation, made in the *Cohen* case, while in part aptly describing the renegotiation acts, falls short in the final analysis of such acts. The renegotiation acts do not require that the profits be found to be excessive "in the estimation of the court and the jury." Both the court and the jury are denied to the contractor. Only the opinion of the Board is necessary.

It is respectfully submitted that no law depriving a citizen of his property has ever received the sanction of this court where the action of the statute is dependent upon the opinion of an agency that the statute shall operate.

It is also respectfully submitted that no law depriving a citizen of his property has ever received the sanction of this court where the extent of the operation of that statute is dependent solely upon the unrestricted opinion of an administrative agency.

This is delegation running riot as was said by Mr. Justice Cardozo in *Schechter Corp.* v. *United States,* 295 U.S. 495, 553.

II.

THE ACTS, VIOLATE THE PROVISIONS OF ARTICLE III, SECTIONS 1 AND 2 OF THE CONSTITUTION OF THE UNITED STATES.

Article III, Sections 1 and 2 of the Constitution of the United States provide in part as follows:

> "Section. 1. The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.
>
> Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States, between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

A statute which vests in the Executive Branch of Government the right to determine that money, other than for taxes, is due from a citizen to the United States, and also vests in the Executive Branch the right to collect the money so determined to be due, by ordering debtors to pay money due such citizen to the Treasury of the United States, without a judgment or decree therefor, violates these sections of Article III. Such a statute divests

the Judicial Branch of the powers and of the duties conferred and imposed upon it.

This statement does not contemplate that in all matters between the citizen and the Government there must necessarily be an invocation of judicial power. The statement does contemplate that in the matter of money demands, not taxes, between the citizen and the Government, which traditionally were matters for judicial determination, there shall be a judicial determination of the validity of the demand, before such claims can be enforced.

Volumes have been written as to the desires of the framers of the Constitution to establish a strong and independent judiciary. The purpose has been stated and restated, but always to the same effect, namely that the Judicial Branch of Government was to afford to the individual the protection against the demands of the Executive Branch or of the Legislative Branch of Government. Traditionally certain matters were the subject only of judicial power and the colonists intended that they should always remain so, but to assure to themselves and to us, that no change could be made, they provided expressly that the judicial power should be vested solely in the courts. Even this provision was not regarded as sufficient. The judicial power was expressly defined as extending to all cases in law, in equity, in admiralty and in maritime jurisdiction. This was not sufficient. The judicial power was to extend to controversies to which the United States and a citizen should be a party. Nothing was to be changed: that which traditionally belonged to the Judicial Branch was to remain so, free from Executive or Legislative encroachment.

In Number LXXVIII of the Federalist we find the following (p. 577):

> "It is far more rational to suppose, that the courts were designed to be an intermediate body between the

people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority."

In Number LXXX of the Federalist, Hamilton considered the various cases subject to the judicial authority. Speaking of the third class of cases enumerated by him, those to which the United States shall be a party, he said, Federalist (p. 588):

"Still less need be said in regard to the third point. Controversies between the nation and its members or citizens, can only be referred to the national tribunals. Any other plan would be contrary to reason, to precedent, and to decorum."

Again, Madison writing Number XLVIII of the Federalist, said (p. 382):

"It is agreed on all sides, that the powers proper belonging to one of the departments ought not to directly and completely administered by either of the other departments."

Jefferson, in "Notes on the State of Virginia," (p. 195) after pointing out that the "powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others," observed that there was no barrier provided by the Virginia Constitution between the several powers. He pointed out that the executive and judicial powers were dependent on the legislative for their subsistence in office and that "They (the legislative branch) have . . . *decided rights* which should have been left to *judiciary controversy.*"

Hamilton said in Number LI of the Federalist (p. 399):

"In republican government, the legislative . . . predominates."

After observing that a remedy for this was to divide it into two branches, he went on to say:

> "It may even be necessary to guard against dangerous encroachments by still further precautions."

In *O'Donoghue* v. *United States*, 289 U.S. 516, 532, Mr. Chief Justice Marshall, is quoted as saying in the debates in the Virginia State Convention 1829-1830, (pp. 616-619):

> "The Judicial Department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all."

This court has given recognition to the intentions and desires of the framers of the Constitution. In 1855 this court announced that situations exist wherein it was not permissible for the Congress to abrogate the powers of the Judicial Branch of Government by withdrawing from it any subject matter which has always been within its cognizance.

In *Murray's Lessee* v. *Hoboken Land*, etc. 18 How. 272, (1855) where the Treasury Department levied upon the lands of a defaulting tax collector and sold his property to pay his defaults, this Court upheld the procedure but was careful to limit its decision to the facts of that case as involving tax collectors. It said, (p. 284):

> "To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination."

In *O'Donoghue* v. *United States*, 289 U.S. 516, it was also said: (p. 530)

> "The Constitution, in distributing the powers of

government, creates three distinct and separate departments—the legislative, the executive, and the judicial. This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, *Springer* v. *Philippine Islands*, 277 U.S. 189, 201, namely, to preclude a commingling of these essentially different powers of government in the same hands. And this object is none the less apparent and controlling because there is to be found in the Constitution an occasional specific provision conferring upon a given department certain functions, which, by their nature, would otherwise fall within the general scope of the powers of another."

In *Crowell* v. *Benson*, 285 U.S. 22 (1931) in discussing the Longshoremen's Compensation Act and in determining that the Act did not divest the Court of its power over those matters which were traditionally matters for determination by the constitutional courts, this Court said: (pp. 56, 57)

"In relation to these basic facts, the question is not the ordinary one as to the propriety of provision for administrative determinations. Nor have we simply the question of due process in relation to notice and hearing. It is rather a question of the appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restrictions. It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency—in this instance a single deputy commissioner—for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Execu-

> tive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law."

Admitting then that there are situations wherein the Congress cannot "sap the judicial power" it would appear that a situation wherein the Executive Branch of Government seeks to take money (not taxes) from an individual, without action in the courts, should stand at the head of all cases to which this principle applies.

But one is not required to speculate about this. In *Kilbourn* v. *Thompson*, 103 U.S. 168, 193, this Court said:

> "If the United States is a creditor of any citizen, or of any one else on whom process can be served, *the usual, the only legal mode of enforcing payment of the debt is by a resort to a court of justice.* For this purpose, among others, Congress has created courts of the United States, and officers have been appointed to prosecute the pleas of the government in these courts." (Emphasis ours.)

Here is judicial recognition of the express prohibition against the United States attempting to enforce payment of a money claim against a citizen in any manner except in a constitutional court.

The principle which we have asserted is founded upon the decisions of this court. It remains, then, only a question as to whether the two renegotiation acts violate that principle.

Under the provisions of the first act, the Under Secretary of War, purporting to act as delegate of the Secretary of War, made a unilateral determination that during the fiscal year 1942, appellant had realized excessive profits

of $775,000. Following this determination, the Under Secretary directed the payment of $204,000 by customers of appellant into the Treasury of the United States and such sum was so paid into the Treasury of the United States.

Under the provisions of Section 403 (c) (1) of the Renegotiation Act the War Contracts Price Adjustment Board entered an order, determining that during the fiscal year 1943 appellant realized excessive profits of $1,265,000. It is admitted that the War Contracts Price Adjustment Board would direct payment by customers of appellant into the Treasury of the United States of $270,000 except for this suit.

Until the enactment of the Renegotiation Act, (February 25, 1944) *no* provision was made to review in courts or elsewhere, determinations made by the Under Secretary acting as a delegate of the Secretary. Following the enactment of the Renegotiation Act, authorizing the filing of petitions for redetermination in The Tax Court, the appellant filed, in The Tax Court, its petitions for redetermination for each of the years 1942 and 1943, and said petitions are each still pending. (R. 136, 142)

The Renegotiation Act provides Section (e) (1):

> "Upon such filing (of a petition in The Tax Court) such Court (The Tax Court) shall have exclusive jurisdiction by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency." (Insertions ours)

The Renegotiation Act further provides, Section (e) (1), that the filing of a petition in The Tax Court shall not operate to stay the execution of the order of the War Contracts Price Adjustment Board.

The Tax Court of the United States is not a court. It is not a part of the Judicial Branch of Government. It is "an independent agency of the Executive Branch of the Government" (Section 1100, Chapter 5, Title 26 U.S. Code 1945, Appendix 131); *Hutchings-Sealy Nat. Bank* v. *Commissioner*, 141 Fed. 2d 422. It is not a reflection on the skill, ability or the integrity of the Tax Court to deny to it jurisdiction of a case of this character. The question revolves around the provisions of the Constitution, not upon the qualities of The Tax Court. This Court has so held in a similar situation. Speaking of legislative courts, Mr. Chief Justice Marshall, in the case of *American Insurance Co.* v. *Canter*, 1 Pet. 511, (p. 545, erroneously marked 321), said:

> "These courts, then, are not constitutional courts, in which the judicial power conferred by the constitution on the general government, can be deposited. They are incapable of receiving it."

Under both renegotiation acts, the Courts of the United States are denied the right to consider either the validity of the statute which provided the basis for the claim, or the merits of the claim as made. Under both statutes the courts of the United States are closed to the citizen who opposes the demands of the executive agency, regardless of the invalidity of the statute, or the impropriety of the demand, unless the Government itself elects to institute suit against the contractor, rather than to direct customers of the contractor to make payment into the Treasury. Under both statutes the Legislative Branch of Government determined the constitutionality of the statutes, and the Executive Branch of Government determined the amount alleged to be due.

What magic surrounds "renegotiation" that allows the Executive Branch to usurp the traditional and constitu-

tionally imposed functions of the Judicial Branch? War is neither an excuse nor a reason for suspending the constitutional provisions. *Schechter Corp.* v. *United States,* 295 U.S. 495, 528. Renegotiation is only a statutory procedure by which an executive agency, purporting to act under the statute which created it, demands that appellant pay into the Treasury of the United States a sum of money which in the opinion of that agency is due the United States, and which indebtedness appellant denies. The amount alleged to be due is not a tax levied by the Congress of the United States. Since the demand is not for taxes, it must arise upon some theory of contract express or implied, or upon some theory of a tort committed by appellant. Demands for money due the United States upon a contract express or implied to which it is a party, are matters for cognizance of courts. Demands for money due the United States by reason of a tort committed against it are also matters for cognizance by courts. The only legal mode of enforcing payment of money due the United States, other than for taxes, whether it be for a tort or upon a contract, is by resort to a constitutional court. *Kilbourn* v. *Thompson,* 103 U.S. 168, 193.

The claim and the means of collection as established by the renegotiation acts, presents the identical situation which caused Article III, Sections 1 and 2 to become a part of the Constitution. It was intended to assure to the citizen the safeguard of judicial power. The citizen needs that safeguard most when the Government, or its agents propose to deprive him of his property.

This Court recently recognized that judicial power extends to certain cases without limitation. In *Stark* v. *Wickard,* 321 U.S. 288, 310, this Court said:

> "But under Article III, Congress established courts to adjudicate cases and controversies as to claims of

infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power."

We think the matter here in controversy is best resolved in the case of *Moore* v. *Robbins*, 96 U.S. 530, where the Government acting through the Department of Interior issued a patent to one Moore. After its issuance, the Department of Interior, believing it had made an error in issuing the patent, in terms, cancelled it. This Court held that it was not competent for the Department to cancel a patent which vested title to land in an individual. The Court said: (p. 532)

"While conceding for the present, to the fullest extent that when there is a question of contested right between private parties to receive from the United States a patent for any part of the public land, it belongs to the head of the Land Department to decide that question, it is equally clear that when the patent has been awarded to one of the contestants, and has been issued, delivered, and accepted, all right to control the title or to decide on the right to the title has passed from the land-office. Not only has it passed from the land-office, but it has passed from the Executive Department of the government. A moment's consideration will show that this must, in the nature of things, be so * * *. With the title passes away all authority or control of the Executive Department over the land and over the title which it has conveyed. * * * If fraud, mistake, error, or wrong has been done, the courts of justice present the only remedy. These courts are as open to the United States to sue for the cancellation of the deed or reconveyance of the land as to individuals; and if the government is the party injured, this is the proper course."

It may be asserted that the procedure established by the renegotiation acts for collection, by direction to customers to pay into the Treasury of the United States, does not constitute a "case" or "controversy" since there

is no proceeding in a court. Such a contention ignores the very purpose of Article III of the Constitution. Article III did not contemplate that the Executive Branch might take the citizen's property provided it could secure the property without the aid of the courts. A case or controversy involving an alleged money claim cannot be made to depend upon the filing of a praecipe or a summons in a clerk's office. The determination of whether a case or controversy exists depends upon substance, not form. *Nashville C. & St. L. Ry.* v. *Wallace*, 288 U.S. 249.

In that case, this court considered, p. 261, the meaning of the words, "case or controversy", and reviewed prior decisions. Adopting the tests as therein suggested, a case or controversy exists when the claim is asserted and the initial step is taken to enforce it. The proceeding here is between adverse parties, seeking a determination of their legal rights. Valuable legal rights asserted by the citizen and threatened with immediate invasion by the Government, will be directly affected to a specific and substantial degree by the decision. The question lends itself to judicial determination and is the kind which this Court traditionally decides. The relief sought is a definitive adjudication of the disputed constitutional right of the citizen to be free from the demand made by an executive agency. The citizen who will be deprived of property is not attempting to secure an abstract determination by the Court of the validity of a statute.

There may be no suit pending in a court, but the adoption of a procedure of adjudication nd collection which ignores the judicial power of a court, cannot change the essential nature of the proceeding.

The Congress itself in the enactment of both statutes recognized that the claim for alleged excessive profits is a case or controversy for cognizance by the Judicial

Branch of Government. Both acts provide that when the Goverment seeks *to collect* the amount of the alleged excessive profits, it *may* institute suits *on behalf* of the United States in the appropriate courts of the United States.

Section 403 (c) (2) of the Sixth Supplemental National Defense Appropriation Act, 1942, provides in part as follows:

> "The Secretary may bring actions on behalf of the United States in the appropriate courts of the United States to recover from such contractor or subcontractor, any amount of such excessive profits actually paid to him and not withheld or eliminated by some other method under this subsection."

Section 403 (c) (2) of the Renegotiation Act provides, in part, as follows:

> "Actions on behalf of the United States may be brought in the appropriate courts of the United States to recover from the contractor any amount of such excessive profits actually paid to him and not withheld or eliminated by some other method under this subsection."

In suits *on behalf* of the Government, to collect alleged excessive profits as determined by the Secretary or the War Contracts Price Adjustment Board, (where collection cannot be made by demand upon the customer) the claim presents a case or controversy and the courts of the United States are designated as the agency through which such collection shall be made. In that situation a case or controversy is admitted to exist and the judicial nature thereof is recognized. The aid of the courts is then invoked. But when the *citizen* attempts to *resist* the demands of the Executive Branch, when he opposes deprivation of his property by executive or administrative action, then the matter is asserted not to be a case or controversy which permits the citizen to invoke the judicial power of

his government. Then, and in that situation, it is asserted that the claim loses its character as a case or controversy and becomes something which is entrusted solely to the executive department.

If the framers of the Constitution were fearful of the power of an Executive or Legislative Branch, and sought to interpose a strong judiciary between the Executive and the citizen, what would have been their reaction to a statute which authorizes the Executive power to invoke the aid of the courts in assisting the Executive in the collection of its claims, which at the same time denies to the Judicial Branch the right or power to protect the citizen when he opposes such election of the Executive?

III.

THE ACTS VIOLATE THE SEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The Seventh Amendment to the Constitution of the United States provides, in part, as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. * * *"

The adoption of the Seventh Amendment was an essential part of the individual's protection against the demands of the Federal Government, which was then being created.

The framers of the Constitution were fearful of the powers which they were vesting in the Federal Government. So fearful were they that they made certain that the Constitution would not be adopted unless safeguards against the great powers were also enacted. They first demanded and obtained a judiciary as far removed from prejudice and favor as was possible. The judges must be

appointed for life, their salaries maintained at the level at which they existed at the time of appointment, and their tenures must be for life or during good behavior. But the framers of the Constitution also were fearful of independent courts. They demanded and obtained an amendment to the Constitution which required the right of trial by jury in civil cases where the amount in controversy exceeded $20.00.

The literature of the framing of the Constitution clearly shows the causes which gave rise to the enactment of the Seventh Amendment. We quote Jefferson: "I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution;" (3 Writings of Thomas Jefferson (Washington Ed. 71), and Washington: ". . . not a member of the Convention . . . had the least objection to what is contended for by the Advocates of the *Bill of Rights and tryal by Jury.*" (Records of Federal Convention, Farrand, Vol. 3, pp. 297, 298) Marshall said: "I hope that in this country, where impartiality is so much admired, the laws will direct facts to be ascertained by a jury." (3 Elliott's Debates 558) Hamilton said: "It has been observed that trial by jury is a safeguard against an oppressive exercise of the power of taxation." Federalist Number LXXXIII (p. 615). Luther Martin said ". . . should any Individual dare to dispute the conduct of an Excise Man, ransacking his Cellars he may be hoisted into the Federal Court from Georgia, to vindicate his just rights or to be punished for his impertinence." 3 Farrand, The Records of the Federal Convention (p. 156). Patrick Henry declared: "I ask you, What is the value of that privilege (the right of trial by jury in civil cases) when Congress, in all the plentitude of their arrogance, magnificence, and power, can take it away from you, will you be satisfied? Are we to go so far, to concede everything to the virtue of

Congress? Throw yourselves at once on their mercy; be no longer free than their virtue will predominate; If this will statisfy Republican minds, there is an end of everything." (3 Elliott's Debates, 544.) (The parenthesis and the words within it have been added by us.)

Men obviously feared despotic power of Government. They feared the Government would enact a law by virtue of which property belonging to a citizen would be transferred by Congress to the Government. They were fearful that that which is being done here, would be done. They regarded a jury trial "as the only anchor ever imagined by man, by which a government can be held to the principles of the Constitution."

The appellees have heretofore taken lightly the contention as to the necessity of a trial by jury. They asserted in the trial court that it is "late in the day to object that the Congressional choice of an expert body to try the facts necessary to carry out regulating measures violates the Seventh Amendment." It is interesting to note that the appellees were assuming that the claim against the appellant is a regulatory measure. They seek to brush off the want of constitutional power of the Executive Branch of Government to assert, determine and collect a claim for money against an individual on the ground that it is a regulatory measure.

It is one thing for the Federal Government to create regulatory measures committing to the Executive Branch of Government the authority to order the affairs of employees and employers; of great transportation and other utility systems in interestate commerce; and of other national social instrumentalities within the powers granted to it. It is quite another thing to say that the Executive alone can regulate in respect of how much a citizen shall pay the Federal Government in exactions other than taxes.

The stark reality is that the appellees, as an administrative agency, assert that appellant owes the Government $270,000 for 1943 and $204,000 for 1942 solely because they determined such to be the fact, and they propose to collect the additional $270,000 as they collected the $204,000, whether they be right or wrong. This is the very thing against which Mr. Justice Paterson raised his voice in *Vanhorne's Lessee* v. *Dorrance*, 2 Dall. 303. In that case, sitting as a trial judge, he said: (p. 308)

> "The right of trial by jury is a fundamental law, made sacred by the Constitution, and cannot be legislated away."

The question in that case was whether an act of a legislature, by which the defendant claimed real estate, was constitutional. In that case, Mr. Justice Paterson (who had been a member of the convention that framed the Federal Constitution) said (p. 309):

> "The English history does not furnish an instance of the kind; the parliament, with all their boasted omnipotence, never committed such an outrage on private property; and if they had, it would have served only to display the dangerous nature of unlimited authority; it would have been an exercise of power and not of right. Such an act would be a monster in legislation and shock all mankind. The legislature, therefore, had no authority to make an act divesting one citizen of his freehold, and vesting it in another, without a just compensation."

It is plain enough that if the Government can do what appellees propose to do in this case by precluding the aggrieved person from having his case tried by a jury, no man is free from despotic action.

The tendency of the Executive Branch of Government to attempt to sustain these arbitrary actions is manifest in the case of *Galloway* v. *United States*, 319 U.S. 372, where

the Attorney General's contentions were upheld by a divided court, and in the case of *Estep* v. *United States*, 327 U.S. 114, where one accused of a crime was denied in the trial court the right to prove before a jury a defense which an administrative agency had determined adversely to him.

If the only legal mode of enforcing payment of a debt due the United States is by resort to a court, *Kilbourn* v. *Thompson*, 103 U.S. 168, and if the determination of the existence of such debt is a matter for determination by a court, it follows that such a claim is the subject matter of a suit at common law, in which suit appellant is entitled to a trial by jury. If any other result be reached, the right to a jury trial deemed so essential has been nullified, and it has been done in the exact situation which the framers of the Constitution feared, and believed they had obviated. It has been done in regard to a claim against a citizen asserted by the Executive Branch, determined by the Executive Branch, and collected by the Executive Branch.

The independent judiciary, the exclusive vesting of judicial power in the courts, and the individual's right to a trial by jury established by the Constitution and the Seventh Amendment, have been legislated away.

IV.

THE ACTS VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The Fifth Amendment to the Constitution of the United States provides that no person shall be deprived of life, liberty or property without due process of law.

Appellant has been deprived of $204,000 and will be deprived of an additional $270,000 unless the proposed action of the War Contracts Price Adjustment Board be restrained.

The first question in respect of the due process clause is whether the Congress may within the provisions of the Fifth Amendment deprive this Court of its traditionally recognized power to determine whether a law be constitutional.

In *Pennekamp* v. *State of Florida*, 66 S. Ct. 1029, 1031, this Court said:

> "The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they do carry a threat of clear and present danger to the impartiality and good order of the courts or whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect."

Section 403 (c) (1) of the Renegotiation Act provides, in part, as follows:

> "In the absence of the filing of a petition with The Tax Court of the United States under the provisions

of and within the time limit prescribed in subsection (c) (1), such order (the order of the Board) *shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency.*" (Italics and parentheses ours.)

Section 403 (e) (1) of the Renegotiation Act provides that:

"Upon such filing (a petition for redetermination) such Court (The Tax Court) shall have *exclusive* jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor, or subcontractor, *and such determination shall not be reviewed or redetermined by any court or agency.*" (Italics and part in parenthesis ours.)

If the Constitution of the United States imposes upon this Court final authority to determine whether appellant has been accorded due process of law, and the Renegotiation Act vests in The Tax Court exclusive jurisdiction over renegotiation matters and denies to this Court or any other Court the right to review the action of The Tax Court, then the Renegotiation Act is in direct conflict with the due process clause of the Fifth Amendment. If the Legislative Branch, by the enactment of the Renegotiation Act, can deny to this Court its "final authority" as vested in this Court by the Constitution, this constitutional limitation on the Legislative Branch has ceased to exist. If the Legislative Branch can transfer to The Tax Court the functions traditionally belonging to and reposed in the courts, then the due process as guaranteed by the Constitution becomes only that which the Legislative Branch shall determine to be due process, not what this Court shall determine it to be.

In our opinion, the invalidity of the Renegotiation Act is apparent on this ground alone without further examination of its provisions.

In addition, the renegotiation acts are invalid in other respects. Before discussing the acts for the purpose of showing their further invalidity, some disposition should be made of those matters which have served only to obscure the real issue and to prevent a determination that the renegotiation acts deny due process of law. Those matters briefly stated are as follows:

(A) While there are wide differences of opinion as to the necessity or effect of the renegotiation acts, those questions are primarily for Congressional determination, and beneficial or otherwise are not subject to inquiry here if within Constitutional limitations.

(B) Recognition is given to the war powers of Congress which permit the government to control the price of every commodity bought and sold within the national boundaries (*Yakus* v. *United States*, 321 U.S. 414); to fix the amount of rent to be charged for every room, home, or building (*Bowles* v. *Willingham*, 321 U.S. 503); to construct extensive systems of public works (*Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288); to operate railroads (*Northern Pacific R. Co.* v. *North Dakota*, 250 U.S. 135); to prohibit the sale of liquor (*Hamilton* v. *Kentucky Distilleries Co.*, 251 U.S. 146); to restrict freedom of speech in a manner that would be unwarranted in time of peace (*Schenck* v. *United States*, 249 U.S. 47); to ration and allocate the distribution of every commodity important to the war effort (*Steuart & Bro.* v. *Bowles*, 322 U.S. 398); to restrict the personal freedom of American citizens by curfew orders and the designation of areas of exclusion (*Hirabayashi* v. *United States*, 320 U.S. 81); and to demand of every citizen that he serve in the armed forces of the nation (*Falbo* v. *United States*, 320 U.S. 549, *Selective Draft Law Cases*, 245 U.S. 366).

But broad as those powers may be, and necessary as

they are conceded to be, the "war powers" do not supersede the other provisions of the Constitution. The exercise of those powers does not extend beyond the limitations imposed by the Constitution itself. *Ex Parte Milligan*, 4 Wall. 2, 121-127; *United States* v. *Cohen Grocery Co.*, 255 U.S. 81; *Estep* v. *United States*, 327 U.S. 114. In *Schechter Corp.* v. *United States*, 295 U.S. 495, discussing this limitation, the court said (p. 528):

> "The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the Constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary. Such assertions of extra-constitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment, 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people'."

(C) Recognition is accorded to the propriety of the delegation of certain powers, in certain situations, to administrative agencies, but the recognition of the propriety of such delegation does not extend to a situation where the administrative agency can assert and determine a money claim by the Government against a citizen and collect it without according to the the citizen a hearing in a constitutional court of the United States *prior* to the collection. *Stark* v. *Wickard*, 321 U.S. 288; *Kilbourn* v. *Thompson*, 103 U.S. 168.

Perhaps, the starting point for the consideration of the two acts as denying due process of law, is the recent decision of the court in *Betts* v. *Brady*, 316 U.S. 455. In that case, this Court said: (p. 462)

> "Due process of law is secured against invasion

by the federal Government by the Fifth Amendment, and is safeguarded against state action in identical words by the Fourteenth. The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances and in the light of other considerations, fall short of such denial."

If then the acts, or either of them, tested by an appraisal of the totality of the facts, show such a denial of fundamental fairness as is shocking to a universal sense of justice, we may assume that such acts, or the act so offending, will be declared unconstitutional, as contravening the Fifth Amendment.

When the first act is discussed, we discuss it in accordance with the interpretation placed upon it by the Secretaries, that is, that it authorized them to make and enter orders determining excessive profits, without having reached an agreement with the contractor or subcontractor.

(A) The First Act (The Sixth Supplemental National Defense Appropriation Act, 1942 as Amended prior to February 25, 1944.)

The first renegotiation act was enacted April 28, 1942. It purports to apply to all contracts of a contractor aggregating over $100,000, unless final payment was made thereon prior to April 28, 1942.

On April 28, 1942, appellant was informed by the provisions of this act that notwithstanding the terms of its contract with its several customers, appellant would not receive the contract price for its merchandise if, in the opinion of the Secretary, the profits which it might realize

on those contracts were excessive in the opinion of the Secretary. This [illegible] something new and original. Appellant may have been willing to have its *prices* determined subsequently upon some basis comparable with the prices paid to other manufacturers of similar articles. Appellant may have been willing to have its *profits* on those articles subsequently determined by some known means, such as is provided by the Internal Revenue Code. But appellant did not then, nor at any other time, agree that such profits should be determined by a stranger to its contracts, even though that stranger be the Secretary of War. In a succeeding portion of this brief, in which the retroactive aspect of the acts are discussed, the effect of the statute on appellant's existing contracts is more fully discussed.

The first consideration in the totality of the facts is the effective date of the act, and the effect upon existing contracts made between persons who, at the time of the making of the contracts, were not advised that the profits on their contracts were subject to diminution by action of and administration officer. Sections 403 (b) (3) and 403 (c) (6) provide that the act shall be applicable unless the aggregate of all the contracts does not exceed $100,000. Section 403 (i) (1) exempts from renegotiation any contract or subcontract for the product of a mine, oil or gas well or other mineral or natural deposit or timber which had not been processed, refined or treated beyond the first step. Section 403 (i) (2) gave the Secretary a discretion to exempt other contracts. The purpose of the act is not stated in the act, and it is impossible to see why it should embrace one manufacturer, depending upon the extent of his contracts or the nature of those contracts, and exempt another contractor because of the nature of those contracts, or the volume thereof, or because of the Secretary's opinion that such contracts should be exempt.

Assuming one knows what are excessive profits, contracts of $99,000 can yield excessive profits as easily as contracts of $101,000. Contracts for the products of a mine, oil or gas well, or timber, are as susceptible of profits as are contracts for the manufacture of Diesel fuel injection pumps, or aircraft engine parts.

In *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32, this Court held that an exaction imposed upon the right to record a mortgage which did not mature in five years with an exemption of mortgages executed to building and loan associations was violative of the due process clause in that it arbitrarily imposed the exactions on a mortgage that did not mature in five years while mortgages which did mature in five years were free from the exaction. Of this, the Court said (pp. 38, 39):

> "Here it seems queer that a circumstance which affects only taxable values has been made the basis of a classification under which one is compelled to pay a tax for the enjoyment of a necessary privilege which, aside from the amount of the recording fee which is paid by each, is furnished to another as a pure gratuity. Such a classification is arbitrary. It bears no reasonable or just relation to the intended result of the legislation. The difference relied upon is no more substantial, as the sole basis for the present classification, than a difference in value between two similar pieces of land would be if invoked as the sole basis for a like classification in respect of such property."

The second consideration then in the totality of the facts is the lack of uniformity based upon any reasonable classification of the industries engaged in a total war, or the nature of the contracts.

Section 403 (c) (1) provides that whenever in the *opinion* of a Secretary of a Department the profits realized, or likely to be realized, may be excessive, the Secre-

tary is authorized to require the contractor or subcontractor to renegotiate the contract *price*. The following sentence of the same section purports to authorize renegotiation to eliminate excessive *profits* on all contracts, and purports to eliminate the necessity of renegotiating *price* on each contract or prices on all of them.

Here is a shock to the universal sense of justice. The opinion of the Secretary that excessive profits are likely to be realized is all that is required to require the contractor to renegotiate *price*. If there be two or more contracts, his opinion alone is all that is required to renegotiate *profits*. This type of a statute, becoming effective upon an opinion of an executive official was held invalid in *Panama Refining Co.* v. *Ryan*, 293 U. S. 388. Under the provisions of this act, four contractors could have made the same profits upon the sale of the same articles, at the same prices. The Secretary of the Navy could have dealt with contractor A and he could have been of the opinion that no excessive profits had been realized. The Chairman of the Maritime Commission could have dealt with contractor B and he could have reached the same opinion. The Secretary of War could have dealt with contractors C and D. As to C, it could have been his opinion that no excessive profits had been realized, but, as to Contractor D, he could have a different opinion, and so D could be renegotiated and his profits could be diminished to the extent determined by the Secretary. Why D alone could be selected in such a situation is not known. The Secretary's opinion that he should be renegotiated is all that was required.

Section 403 (a) (4) defines excessive profits as follows:

> "(4) the term 'excessive profits' means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits."

If there were any prior doubt as to the denial of fundamental fairness, this section should immediately dispel that doubt. Excessive profits shall be that which is found by the Secretary to be excessive profits. Short and simple, but not due process.

Without repetition, we again adopt all that was said under Point I of this brief to the effect that the definition of excessive profits failed to provide any adequate standards for the guidance of the administrative agency. But considered only under this part of the brief, the right to select certain contractors to be renegotiated from the body of all contractors, with the definition of excessive profits does not appeal to the universal sense of justice.

Section 403 (c) (4), which is the only section of this act which purports to define how the determination of excessive profits shall be made, provides as follows:

> "(4) Upon renegotiation pursuant to this section, the Secretary may make such final or other agreements with a contractor or subcontractor for the elimination of excessive profits and for the discharge of any liability for excessive profits under this section, as the Secretary deems desirable. Such agreements may cover such past and future period or periods, may apply to such contract or contracts of the contractor or subcontractor, and may contain such terms and conditions, as the Secretary deems advisable. Any such agreement shall be final and conclusive according to its terms; and except upon a showing of fraud or malfeasance or a wilful misrepresentation of a material fact."

Whether the section contemplated a determination only after an agreement between the Secretary and the contractor, the fact is that the Secretary made his own determination. The contractor has nothing to do with the determination. Appellant speaks from experience. After failing to acquiesce in the Secretary's opinion as to the

realization of excessive profits of $775,000, appellant received the order of October 27, 1943, wherein the Secretary determined that excessive profits of $775,000 had been realized. The order recites "that as a basis for said renegotiation the Under Secretary of War considered certain financial, operating and other data submitted by the Contractor, *or obtained by the Under Secretary of War from Governmental or other reliable sources* relating to the profits realized by the contractor during said fiscal year." (Italics ours.) (R. 170)

What data was received from governmental sources is known only to the Secretary. What the other reliable sources were, is known only to the Secretary. What data was received from those other reliable sources is known only to the Secretary. This information the Secretary refused to furnish to the contractor. Attached to and made a part of the complaint (Exhibit C) is a letter of Lt. Col. Martens, Chief Renegotiation Branch, on the stationery of the War Department to appellant's attorney, wherein the appellant's request for information as to the facts used as a basis for the determination was refused. (R. 172)

No comment is necessary as to whether the order and the letter denying information as to the basis of the determination constitute such a denial of fundamental fairness as is shocking to the universal sense of justice. That such procedure cannot be upheld is evident from the decisions of this court. In *Ohio Bell Tel. Co.* v. *Comm'n.*, 301 U.S. 292, this Court considered a similar order of an administrative agency. This Court, in discussing the order and the action of the agency, said (p. 296):

> "It undertook also to fix a valuation for each of the years 1926 to 1933 inclusive. For this purpose it took judicial notice of price trends during those years, modifiying the value which it had found as of

the date certain by the percentage of decline or rise applicable to the years thereafter. The first warning that it would do this came in 1934 with the filing of its report. 'The trend of land valuation was ascertained,' according to the findings, 'from examination of the tax value in communities where the company had its largest real estate holdings.' 'For building trends resort was had to price indices of the Engineering News Record, a recognized magazine in the field of engineering construction.' 'Labor trends were developed from the same sources.' "

In condemning such an order and setting aside the proceedings, this Court said (pp. 302, 303):

"From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out. When price lists or trade journals or even government reports are put in evidence upon a trial, the party against whom they are offered may see the evidence or hear it and parry its effect. Even if they are copied in the findings without preliminary proof, there is at least an opportunity in connection with a judicial review of the decision to challenge the deductions made from them. The opportunity is excluded here. The Commission, withholding from the record the evidential facts that it has gathered here and there, contents itself with saying that in gathering them it went to journals and tax lists, as if a judge were to tell us, 'I looked at the statistics in the Library of Congress and they teach me thus and so.' This will never do if hearings and appeals are to be more than empty forms."

To the same effect are *Morgan* v. *United States*, 304 U. S. 1 and *Morgan* v. *United States*, 298 U. S. 468.

Appellant was renegotiated upon an opinion of the Under Secretary of War. Under the statutory definition of excessive profits, excessive profits were found to have

been realized by the same person who expressed the opinion that excessive profits had been realized. Upon data unknown to appellant, but in part alleged to have been received from governmental or other reliable sources, also unknown, $775,000 was determined to be excessive profits. In the workings of this statute, only one further act in the denial of fundamental justice could occur. It did occur in July, 1944.

This act, enacted April 28, 1942, contained *no* provision whatsoever for any review, judicial or otherwise, of the determination made by the Secretary. On October 27, 1943, when appellant received the order of the Secretary there was a reasonable certainty that the renegotiation act would be repealed, amended, or revised in order that contractors might not be subjected to the arbitrary action of the Secretary. On February 25, 1944, the Renegotiation Act, as a part of the Revenue Act of 1943, was enacted. Under this act, Section (e) (2), a contractor aggrieved by a determination made prior to February 25, 1944, could file within 90 days after February 25, 1944, a petition for redetermination in The Tax Court. Appellant filed such a petition on May 18, 1944, alleging the invalidity of the act, and its improper application, even if the act be determined to be valid. (R. 136)

Section 403 (c) (2) of both acts, authorizes the Secretary, upon renegotiation, to eliminate excessive profits by (1) reduction in contract price, (2) by withholding from amounts otherwise due the contractor, (3) by directing a contractor to withhold for the account of the United States from amounts otherwise due to the subcontractor any amount of such excessive profits under the subcontract, (4) by recovery through repayment, credit or suit any amount of excessive profits actually paid, and (5) by any combination of these methods. The Secretary

was authorized to bring suits on behalf of the United States in the appropriate courts of the United States to recover any amount of excessive profits paid and not otherwise eliminated.

In April, 1944, the Secretary directed customers of appellant to withhold $204,000 for the account of the United States from the funds then due appellant on current business. In July 1944, *after* appellant had filed its petition for redetermination in The Tax Court, the Under Secretary directed some of those customers to pay $204,000 into the Treasury of the United States, and said sum due to appellant was so paid into the Treasury of the United States by such customers, who are indemnified by the United States upon the making of such payments. (Section (c) (2))

Appellant's petition for redetermination of alleged excessive profits is still pending in The Tax Court, but the $204,000 has been paid into the Treasury since July, 1944.

Such is an analysis of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, and a summary of its application to appellant, as the Act was construed and applied by the Secretary.

All this happened to appellant notwithstanding that the first act is devoid of any authority to make a unilateral determination. Thus appellant was deprived of $204,000 under an administrative construction of the act which construction has no basis except the desires of the Secretaries to exert power.

The first act, does not authorize the Secretaries to make unilaterial determination of "excessive profits." They could make no determination of excessive profits without the agreement of the contractor. "Renegotiation" as used in the act had its ordinary connotation: a new negotiation with a view of making readjustments. Hensel's

affidavit (R. 91-94) Patterson's affidavit (R. 22 et seq.) It is said that many contractors wished to make voluntary agreements to return money in excess of that they thought should have been paid. The act provided an orderly method of doing this. Section 403 (c) (1) provided in part:

> "Sec. 403 (c) (1) Whenever, in the opinion of the Secretary of a Department, the profits realized or likely to be realized from any contract with such Department, or from any subcontract thereunder whether or not made by the contractor, may be excessive, the Secretary is authorized and directed *to require the contractor or subcontractor to renegotiate the contract price.* When the contractor or subcontractor holds two or more contracts or subcontracts the Secretary in his discretion, may *renegotiate* to eliminate excessive profits on some or all of such contracts and subcontracts as a group without separately *renegotiating* the contract price of each contract or subcontract." (Italics ours.)

Like the Labor Relations Act, 49 Stat. 449, 29 U.S.C. 158 (5), these is no compulsion except the duty to negotiate in a bona fide manner, as the employer under the National Labor Relations Act is required to bargain in a bona fide manner. *Labor Relation Board* v. *Sands Mfg. Co.*, 306 U.S. 332. But here, like there, there is no requirement that an agreement should be made. To be sure, the Secretary was authorized to collect, but this was only after an agreement had been reached. Section (c) (4) provides: "Upon renegotiation the Secretary is authorized and directed to eliminate any excessive profits under such contract or subcontract . . ." Then follows several methods for the elimination of excessive profits, determined by agreement. Section (c) (4) makes it more plain that only voluntary agreement was contemplated. It provides as follows:

> "(4) Upon renegotiation pursuant to this section, the Secretary may make such final or other agreements with a contractor or subcontractor for the elimination of excessive profits and for the discharge

of any liability for excessive profits under this Section, as the Secretary deems desirable. Such agreements may cover such past and future period or periods, may apply to such contract or contracts of the contractor or subcontractor, and may contain such terms and conditions, as the Secretary deems advisable. Any such agreement shall be final and conclusive according to its terms; and except upon a showing of fraud or malfeasance or a wilful misrepresentation of material fact."

We are not alone in our interpretation of the act. Appellee Patterson said "'Renegotiation', in and of itself implies an agreement, mutual agreement . . . you can argue that it means 'move in.' I myself, believe that renegotiation is mutual." (Hearings before a Subcommittee of the Committee on Finance, United States Senate, 77th Congress, 2nd Session, on Section 403 of Public Law Numbered 528 p. 13) The act was amended three times after Mr. Patterson testified as quoted above before any change was made in respect of this language of the statute.

Appellant has printed in some detail the legislative history of these acts in an appendix which it has filed with this brief. There has been much discussion as to whether or not this legislative history proves anything, in respect of whether the Congress intended that there should be "compulsory renegotiation." If the contradiction in terms were not sufficient to disprove the contentions of those who say that the Congress intended there should be "compulsory renegotiation," the legislative history does disprove such fact.

More than that, construed as appellant construes it, all the provisions of the act are logical. Construed as appellees would construe it, all are most illogical. The definition of excessive profits contained in the first act—"any amount of the contract or subcontract which is found as a result of renegotiation to represent excessive profits"

is logical, as we construe the act. As appellees construe the act, it is illogical. The provisions contained in Section (c) (4) of the act that: "such agreement shall not be reopened as to matters agreed upon and shall not be modified by any officer, employee or agent of the United States, and such agreement and any determination made in accordance *therewith* shall not be annulled, modified, set aside, or disregarded in any suit, action or proceedings," are logical as we construe the act. Viewed in any other light, they are not only illogical, but they render the act unconstitutional for the reasons we have heretofore shown.

If anything need be added, it need only be pointed out that the War Department Price Adjustment Board on August 10, 1942, published a pamphlet entitled "Principle, Policy and Procedure" to be followed in renegotiation. One may read this document from cover to cover and not find one word in respect of compulsory renegotiation, unilateral determinations or any procedure by which the War Department suggested that it had any right to compel the contractor to make any repayment in any amount except upon the contractor's agreement to do so. The Secretaries truly made their own law without lawful delegation of power to do so, when they determined that the first act authorized them to make a "unilateral" order determining excessive profits. It was never intended by the Congress in enacting the first act, that they should do so.

Such is the totality of the facts to be appraised by this court, in determining whether the due process clause of the Fifth Amendment has been contravened. We contend that it has been. The facts speak more eloquently than any comment we could make.

The Second Act (The Renegotiation Act).

On February 25, 1944, the Renegotiation Act was enacted as a part of the Revenue Act of 1943. It purports to apply to all contracts or subcontracts aggregating $500,000 to the extent of amounts received or accrued thereunder in any fiscal year ending after June 30, 1943, whether such contracts or subcontracts were made on, prior to or after the date of the enactment of the Revenue Act of 1943. (Section 403 (c) (6))

In a succeeding portion of this brief designated "Retroactivity" the effect of this statute on appellant's existing contracts as applied to sales made in 1943, is fully set forth and is not repeated here. Attention is, however, directed to the fact that again a statute was enacted, which by its terms purports to subject contracts made prior to the enactment of the statute to change, alteration and modification by a stranger to those contracts, this time by the War Contracts Price Adjustment Board, an administrative agency newly created by this act. (Section (d) (1))

Section (i) (1) provides that the Act shall not apply to (a) contracts between the departments, between the departments and a State, territory or agency thereof, or, with any foreign government, (b) any contract or subcontract for the product of a mine, oil or gas well, or other mineral or natural deposit, or timber which has not been processed, refined or treated beyond the first form suitable for industrial use, (c) any contract for an agriculture commodity in its raw or natural state, which agriculture commodities shall include, but were not limited to commodities resulting from cultivation of the soil, grains, fruits, nuts, vegetables, hay, straw, cotton, tobacco, sugar cane, sugar beets, natural resins, saps,

gums of trees, animals such as cattle, hogs, poultry, sheep, fish and the produce of live animals such as wool, eggs, milk or cream (d) any contract exempt under Section 101 (6) Internal Revenue Code, (contracts of religious and charitable organizations) (e) any contract with a department awarded as a result of competitive bidding for the construction of a building, structure, improvement or facility.

In addition to the foregoing statutory exempt contracts, Section 403 (i) (4) gave to the Board the power in its discretion to exempt other contracts, namely (a) contracts to be performed outside of the United States, or in Alaska, (b) those contracts which in the opinion of the Board the profits can be determined with reasonable certainty when the contract price is established, (c) any contract or subcontract if in the opinion of the Board the provisions of the contract were otherwise adequate to prevent excessive profits, (d) any contract or subcontract for the making or furnishing of a standard commercial article, if in the opinion of the Board competitive conditions affecting the sale of such article are such as will reasonably protect the Government against excessive prices, (e) any contract or subcontract, if in the opinion of the Board competitive conditions affecting the making of such contract are likely to result in effective competition, (f) any subcontract or group of subcontracts not otherwise exempt, if in the opinion of the Board, it was not administratively feasible to determine and segregate the profits of those contracts from the profits attributable to activities not subject to renegotiation. The exemption of standard commercial articles was intended to aid industry, but the definition of a "Standard Commercial Article" contained in Section (a) (7) coupled with the right given by Section (i) (2) to the War Contracts Price

Adjustment Board to interpret and apply the definition of "standard commercial articles" as contained in subsection (a) (7), soon demonstrated that this exemption was merely the rendition of lip service to industry. Needless to say, appellant's contention that a substantial part of its sales were of standard commercial articles, was denied by the Board. Needless to say, appellant's request for a certificate of exemption on standard commercial articles was denied. (R. 148)

If the first Act (1942) demonstrated a lack of uniformity in its operations, without any reasonable basis therefor, what must be said of the Renegotiation Act? Exemption after exemption appears without any reasonable basis. Assuming one knows what excessive profits may be, what rational relationship exists between excessive profits on sales of $500,000 and over, that is not equally applicable to excessive profits on sales of $499,000? Surely excessive profits can be realized on contracts of $499,000 as easily as on contracts of $500,001. Certainly the size of a contract is not proof of profits. If a fair limitation in 1942 was $100,000, why in February 1944 was $500,000 the starting point for those searching for excessive profits?

Examine the list of discretionary exempt contracts, (a) to (e) above, and it will be apparent that the Board could exempt *every* contract of *any* kind if it so desired. This is the degree of arbitrary classification which the Court condemned in *Louisville Gas Co.* v. *Coleman,* 277 U. S. 32.

Section 403 (c) (1) provides, that whenever in the opinion of the Board, the amounts received or accrued under contracts with the Departments may reflect excessive profits, the Board shall give reasonable notice of the time and place of a conference with respect thereto. The same section provides that if the Board does not make an

agreement with respect to the elimination of excessive profits received or accrued, it shall enter an order determining the amount and give notice thereof, by registered mail to the contractor or subcontractor. Here there is no necessity for the assumption by administrative officers of arbitrary power. Such power is expressly provided by this statute.

Under this section, if one has contracts not exempt by the statute, or not exempt by reason of the discretion vested in the Board, renegotiation proceedings may be commenced, if in the opinion of the Board, the amounts received or accrued may reflect excessive profits. There need be no logical basis for such opinion. There is nothing in the act which controls that opinion. But if the Board be of that opinion, the contractor is advised that a conference will be held with respect to the alleged excessive profits. No finding of facts need be made. It is not a hearing in any known sense of the word. No complaint or charges are presented which one might answer. It is a conference. If the contractor fails to acquiesce in the opinion of the Board, expressed in this or subsequent conferences, then under this section, (c) (1), the Board may enter an order determining the amount of the alleged excessive profits. It did.

But the entry of the order is not all that occurs. Section (c) (1) further provides that in the absence of the filing of a petition in The Tax Court within the time provided by section (e) (1) the order of the Board, "shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency." Section (e) (1) giving the right to file a petition in The Tax Court also provides:

> "The filing of a petition under this subsection shall not operate to stay the execution of the order of the Board under subsection (c) (2)."

Stripped of unnecessary words, the contractor selected by the Board for renegotiation is invited to a conference with respect to his alleged excessive profits. He may acquiesce in the Board's determination of excessive profits, but should he fail or refuse to do so the Board will enter an order determining the amount of his alleged excessive profits regardless of the contractor's objections. If the contractor fails to file a petition in The Tax Court, the determination of the Board is final and conclusive, and not subject to review or redetermination by any court or agency. If the contractor files a petition in The Tax Court in the manner provided by the statute, it does not operate to stay the order of the Board. This is the procedure followed which deprived appellant of $204,000 in July, 1944, while its petition was and is still pending in The Tax Court. This is the procedure followed under which appellees admit they would deprive appellant of an additional $270,000 determined by the Board to be due for the year 1943, regardless of the fact that appellant had filed in The Tax Court its petition for redetermination for the year 1943, and regardless of the fact that there has been no hearing thereon.

In an appraisal of the totality of the facts, does this procedure meet with any conception of a universal sense of justice?

Section 403 (a) (4) of the first act, defined excessive profits as those found as a result of renegotiation to represent excessive profits. This definition was apparently admitted to be so vague and uncertain as to invalidate the act, so when the Renegotiation Act was enacted, an attempt was made to correct this error and to direct the Board's attention to seven factors which shall be considered in determining excessive profits. The result is the inclusion in the definition of many meaningless words, all of which still permit the Board to do as it desires.

It will be noted that excessive profits are to be determined not alone upon the alleged factors named, including the elastic factor numbered (vii). It is required only that such factors shall be considered. What else may be, or is, considered remains unknown. We again adopt all that was said under Point I of the brief to the effect that this alleged definition of excessive profits failed to provide any adequate standards for the guidance of the administrative agency.

Considered here, solely as a part of the totality of the facts, does the definition of excessive profits exhibit that fundamental fairness essential to due process of law?

After a conference in which appellant was advised of the Board's opinion as to the realization of excessive profits, in which opinion appellant refused to concur, appellant received the Order under Delegated Authority Determining Excessive Profits dated January 11, 1945, which, upon the refusal of the Board to review the decision of the delegate became the order of the Board. (Exhibit A to complaint. (R. 140) Again in the order it is recited that "there was submitted by the contractor and obtained from governmental or other reliable sources, certain financial operating and other data relating to the contractor's business and the contractor's profits," and upon consideration thereof it was determined that appellant realized excessive profits of $1,265,000 in its fiscal year ended November 30, 1943. (The appellant reported profits of $1,393,470.36 *before* taxes of $991,340.37, net after taxes $402,129.99. If the renegotiation demands for 1943 be allowed to stand appellant realized a profit of $128,470.36 *before* taxes, reduced by taxes of $74,740.37 to $53,729.99 *after* taxes, or to 1.514% of its sales. (Exhibit F to complaint, R. 186 side folio).

Does the entry of this order, upon data received from

governmental or other reliable sources, which were unknown to appellant appeal to the universal sense of justice? It did not do so in *Ohio Bell Tel. Co.* v. *Comm'n.*, 301 U. S. 292.

Following the receipt of said order, appellant in compliance with section (e) (2), filed its petition for redetermination for the fiscal year 1943 in The Tax Court, where said petition is still pending. (R. 142)

Attention is again directed to the fact that under section (e) (1) the filing of said petition does not stay the execution of Board under section (c) (2). Appellant alleged that collection would be made, as in the prior year, by direction to its customers to make payment and, therefore, filed this suit. The affidavit filed by appellee Hirsch admits that appellant's allegation was well founded, and that appellees proposed to effect collection of the amount determined by the Board in the same manner as was done in the prior year regardless of the pendency of appellant's petition in The Tax Court. (R. 117)

The threatened deprivation of property following a conference, while appellant was attempting to secure a hearing in the agency designated by the act, does not appeal to a universal sense of justice. One expects a hearing *before* it is deprived of its money.

We adopt here all that has been said before under Point II as further supporting our contention that a hearing before The Tax Court does not constitute due process in a suit, where the very nature of the claim establishes that it is traditionally a matter for constitutional courts.

One other matter common to both acts must receive attention in a consideration of a totality of the facts. Neither the 1942 act or the 1944 provides a means or a procedure for the recovery by the contractor of the amounts illegally taken from him, if it should appear that

the acts are invalid, or that the Board was in error in its opinion that excessive profits had been realized, or if it should appear that the Board was in error as to the amount of such excessive profits. In a consideration of the totality of the facts with regard to so drastic a statute, one would expect to find a simple and speedy procedure for the correction of such errors, and for the refunding of the amounts illegally collected with interest. No such provision is contained in either act.

Does the absence of any corrective procedure, or a procedure for refunds of amounts equal to those collected, indicate a lack of fundamental fairness or is it to be assumed that the determination of the War Contracts Price Adjustment Board made upon the definition of excessive profits will always be sustained, or will be increased, by The Tax Court?

The retroactive effect of the acts as a denial of due process.

Reference has been made before to the retroactive features of both acts, as being a denial of due process.

It is not contended that all laws with retroactive effect are invalid. Retroactive effect of revenue and tariff laws, within reasonable degrees has been approved. *Welch* v. *Henry*, 305 U. S. 134 and *United States* v. *Heinszen & Co.*, 206 U.S. 370. In *Illinois Central R. Co.* v. *Minnesota*, 309 U.S. 157, it is said (p. 165):

> ". . . liability for retroactive taxes is 'one of the notorious incidents of social life.'"

The doctrine of retroactivity has not been extended, however, and even retroactive revenue laws are not favored. When arbitrary or capricious, retroactive revenue laws have been held to offend the Fifth Amendment. *Nichols* v. *Coolidge*, 274 U. S. 531; *Untermyer* v. *Anderson*, 276 U. S. 440.

The permissible area in which the doctrine of retroactivity may be sanctioned is stated in *Forbes Boat Line* v. *Board of Comm'rs.*, 258 U. S. 338. In that case the legislature of Florida attempted to pass a statute retroactively in respect of the power or right to charge tolls to pass through a lock.

In the case, Mr. Justice Holmes, speaking for a unanimous court, said (p. 340):

> "But Courts cannot go very far against the literal meaning and plain intent of a constitutional text. Defendant owed the plaintiff a definite sum of money that it had extorted from the plaintiff without right. It is hard to find any ground for saying that the promise of the law that the public force shall be at the plaintiff's disposal is less absolute than it is when the claim is for goods sold. *Yet no one would say that a claim for goods sold could be abolished without compensation.* It would seem from the first decision of the court below that the transaction was not one for which payment naturally could have been expected. To say that the legislature simply was establishing the situation as both parties knew from the beginning it ought to be would be putting something of a gloss upon the facts. We must assume that the plaintiff went through the canal relying upon its legal rights and it is not to be deprived of them because the Legislature forgot." (Italics ours.)

The first act was enacted April 28, 1942. It purports to apply to all contracts made prior to said date unless final payment was made on said contract prior to April 28, 1942 (Section 403 (c) (6)). During the fiscal year, ended November 30, 1942, appellant's total sales were $2,706,477.33, of which the Secretary determined $2,446,328.55 to be subject to renegotiation. (Compl. par. 3, R. 135)

In the complaint, (paragraph 35, R. 157) appellant alleged that 80% of the dollar value of its shipments made

in 1942 went to four customers, that such shipments were upon contracts made between the appellant and the customer prior to April 28, 1942, and that the aggregate of such shipments was $1,886,770.11 all of which was included by the Secretary in the amount alleged to be subject to renegotiation. Appellant alleged, (paragraph 37, R. 158) that the first act could not subject those sales to renegotiation which were made upon contracts made prior to April 28, 1942.

Some question existed as to whether the writings (all set out in the Kelleher affidavits and by reference made a part of the complaint) (R. 152) were contracts, or whether those writings were only statements showing an intention to purchase, becoming contracts only to the extent of purchase orders received subsequently to date of such writings. In view of this question, appellant then alleged, (paragraph 38, R. 158) that if the purchase orders *only* were contracts, then its shipments on purchase orders received prior to April 28, 1942, were $1,625,023.65, and that the act could not subject money derived from those purchase orders to renegotiation.

Whether the writings are contracts, or whether only the purchase orders are the contracts, is admittedly a matter for the determination of the trial court upon a hearing, and the several contracts do not now require the attention of this Court. Whether the act can embrace contracts made prior to April 28, 1942 is a matter, in our opinion, for the decision of this Court.

The facts are recited here solely as a means of showing the retroactive effect of the first law. The extent of retroactivity herein considered with the subject matter to which it is applied, goes beyond the extent permitted under the decision in the *Forbes* case.

The second act, the Renegotiation Act, raises even more

substantial questions as to its validity, because of its retroactive effect.

This act was enacted February 25, 1944. It purports to be applicable to all contracts and subcontracts to the extent of any amount received or accrued thereunder in a fiscal year ending after June 30, 1943, whether such contracts were made on, prior to or after the date of the enactment of the Revenue Act of 1943. (Section 403 (c) (2).)

The first question, as is shown by the allegations of the complaint is whether the Renegotiation Act so enacted February 25, 1944, can, even if it be otherwise valid, have retroactive effect as to the sales of appellant during the period December 1, 1942 to November 30, 1943. (Compl. par. 17, R. 144, 145, 146)

The further questions are to some extent similar to those applicable to the first act, but with the much greater extension of the degree of retroactivity.

During the fiscal year ended November 30, 1943, appellants total sales were $3,548,845.50, its costs $2,155,375.14, its profits before taxes $1,393,470.36, its taxes $991,540.37, and its profit after taxes $402,129.99. (Compl. par. 5, R. 137, 138) In the complaint (paragraph 22, R. 156) appellant alleged that 80% of the dollar value of its shipments made in fiscal year 1943 were made to the same four customers; that such shipments were upon contracts made between appellant and the customers prior to April 28, 1942; that the aggregate of such shipments was $2,780,009.82, all of which was included by the War Contracts Price Adjustment Board in the amount alleged to be subject to renegotiation. Appellant then alleged, paragraph 23 of the complaint (R. 152, 153) that neither the Renegotiation Act (February 25, 1944) or the first act (April 28,

1942) could subject those contracts made prior to April 28, 1942 to renegotiation.

The same question existing as to whether the writings were actual contracts or merely statements of an intent to purchase becoming contracts only to the extent of purchase orders subsequently received, appellant alleged that if only subsequent purchase orders were the contracts, then shipments on purchase orders received prior to April 28, 1942 were $175,423.71. It was then alleged, paragraph 27 of the complaint (R. 154) that the Renegotiation Act could not subject such purchase orders, received prior to April 28, 1942 to renegotiation.

The allegations pertaining to the contracts and shipments in the years 1942 and 1943 are contained in paragraphs 22 to 29, and 35 to 39 of the complaint. (R. 152-155 and R. 157-159)

Analysis of the renegotiation acts shows that, as to contracts in existence, prior to the enactment dates of each of the acts, the apparent aim and purpose of the acts was that the Government should pay less on such contracts than the contracts stipulated, if the Secretary (under the first act) or the War Contracts Price Adjustment Board (under the second act) made a determination that less should be paid because of the realization of alleged excessive profits. In the end the Government pays less on a valid and binding contract than it agreed to pay and by its action requires appellant to accept less for its products than it had contracted to receive from its customer. The acts do that which Justice Holmes condemned, namely, abolish a claim for goods sold.

These acts called renegotiation, are in fact, legislative repudiation by the United States of America of its contracts. The acts go beyond direct repudiation. They require contractor A to repudiate his contract with con-

tractor B, not because B failed to perform as he had agreed to do, but because in the opinion of an administrative agency of the United States, B realized excessive profits. In the *Sinking Fund Cases*, 99 U. S. 700 this Court said: (p. 719)

> "The United States are as much bound by their contracts as are individuals. If they repudiate their obligations it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a state, or a municipality or a citizen."

This language has been repeated in *Lynch* v. *United States*, 292 U.S. 571, 580 and *Perry* v. *United States*, 294 U.S. 330, 351. Substantially the same statement was made in *United States* v. *Standard Rice Co.*, 323 U.S. 106 and *United States* v. *Bethlehem Steel Corp.*, 315 U.S. 298.

This doctrine is not new, nor is it outmoded.

V.

BOTH ACTS VIOLATE THE TENTH AMENDMENT TO THE CONSTITUTION.

The Tenth Amendment to the Constitution is as follows:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Unless the renegotiation acts come within some constitutional grant of power they cannot be sustained. This is true, though many may believe that the acts embody a commendable social plan, and are in sympathy with the alleged purpose, if a purpose is ascertainable. The test and the only test is whether the acts are within

the limits of federal power. *Schechter Poultry Corporation* v. *United States*, 295 U. S. 495; *Child Labor Tax Case*, 259 U. S. 20. In their briefs filed in the trial court, appellees asserted that the acts come within the grant of the war powers to the Federal Government. It was asserted that the acts were regulating acts, regulating the procurement of materials, and that in addition the acts were means of keeping up the morale of the fighting men. These alleged purposes are not to be found in the acts themselves. That they are not regulating acts is certain from their operation. That they have nothing to do with the morale of the soldier is even more certain.

It is admitted that the war powers are among the most extensive of all Congressional powers. If the end to be achieved be determined to be within the war powers, Congress may determine the form in which the powers shall be constitutionally exercised. But, there must be some relation between the acts and the powers pursuant to which they purport to have been enacted. If the acts are not actually the exercise of "war powers," the use of that phrase will not aid in their support.

In an examination of the acts to determine whether they come within the war powers, it is conceded that the Government has the power to purchase materials for war, and to make such purchases as cheaply as possible. But the right to purchase as cheaply as possible does not relieve the government from the necessity of paying the price provided in its contract. *U. S.* v. *Bethlehem Steel Corp.*, 315 U.S. 289. Nor does the right to purchase as cheaply as possible carry with it the right to determine that one contractor's profits are excessive and should be diminished while those of another are allowed to remain unchanged.

There is no reason to believe that because an efficient manufacturer realizes more than that which is regarded

as normal profit, he is necessarily charging a higher price than another manufacturer who makes no profit. Under the type of statute considered here, the inefficient, expensive contractor might be free from renegotiation by reason of the fact that his inefficiency brought no profits while the capable contractor might make large profits doing precisely the same work, and by so doing be subject to renegotiation under the terms of the act. It will be asserted that contractor A could not perform as cheaply as contractor B, and that therefore A should receive higher prices. If such be the fact, then A should receive more for his product than B, but B's net profit should not be reduced because of the very efficiency of operation which the Government needed, encouraged and employed. The real question under the war powers, is the *cost* to the Government of the articles needed, not whether such cost yielded to one profits greater than to another. Revenue laws amply protect against the realization of excess profits.

That there was a great demand for materials of every kind and nature in 1942 and 1943 is admitted, but the renegotiation acts did nothing to assist in satisfying that demand. The acts as written may have prevented a large volume of manufacturing, rather than have given it an impetus at a time when the Congress ought to have been stimulating production. The business of exempting from renegotiation contractors and subcontractors who did not do a volume of business as great as $500,000 per year is not within the war power whatever may be one's notions of economics. Every incentive to increase, expand and speed production except the manufacturer's patriotism, is contravened by such a provision in the law. The contractor was told that if his aggregate was less than $500,000 he could not be renegotiated, and that he could keep every dollar of the profits realized. He was told that

if his sales exceeded $500,000 he would be subject to renegotiation and that the Board could take away from him whatever profits it deemed excessive. Patriotic endeavor alone, accounts for the record production of American industries. The renegotiation acts would have prevented that record production and failing in such effort would now exact penalties for the efforts which did increase production. Higher taxes were certain but they were uniform. Taxes did not depend upon an opinion of an individual nor upon the volume of business. The appellant, as this record plainly shows, would make more money on sales of $499,000, free from renegotiation, than it will make as renegotiated by the War Contracts Price Adjustment Board on sales of $3,548,845 in the year 1943.

The Renegotiation Act, did not even apply to a great number of contracts for materials used in the war regardless of the aggregate. The list of exempt contracts for war materials, regardless of the sum involved, is quite impressive. The list of discretionary exempt contracts for war materials regardless of the sum involved is even more so. If the war powers are the basis for the support of acts it would seem that the acts should apply to all contracts for war materials with some degree of uniformity, not dependent upon volume, or the opinion of an administrative agency.

Finally we come to the theory that the morale of the men of the fighting forces will be raised by the consciousness that manufacturers are not realizing excessive profits as a result of the war. The revenue laws are known to afford ample protection against the retention of excess profits. No one can draw a distinction between excessive profits from diesel equipment and excessive profits from erection of a building, or other exempt contracts for war materials, whether such exemption be mandatory or discretionary with the Board. We confidently assert that the

morale of the soldier is best raised and maintained by the knowledge that he has the best and finest equipment that money will buy, and by the knowledge that it will be readily available when needed. If this be so, the soldier does not care what it costs. To him, living is so imperative that cost of equipment means nothing. It is extremely doubtful whether he is really interested in whether the equipment was manufactured under an exempt contract, a discretionary exempt contract, by a manufacturer whose sales did not exceed $500,000 or by a manufacturer whose sales did exceed that figure. Those questions are of little importance and of no aid to his morale.

In our opinion the Renegotiation Act has no connection with the prosecution of war, and cannot be supported as an exercise of the war powers. Failing in such support it is not within the powers delegated to the Federal government.

VI.

IRREPARABLE INJURY WILL RESULT IF THE INJUNCTION BE DENIED.

Appellant's right to an injunction restraining collection is dependent upon the fact that irreparable injury will result from the denial of such injunction.

It is affirmatively asserted by respondents that additional collections will be made from appellant's customers in the same manner as was done under the prior determination for the year 1942. There is no uncertainty as to what will happen. The sum of $204,000 has already been collected pursuant to the first act, under circumstances similar to those now existing. The additional sum of $270,000 will be collected under the Renegotiation Act. This has only been prevented after the decision of the

trial court by appellant's filing bond in the sum of $100,000 pending the decision of this Court. The deprivation of $474,000 to a small company such as appellant, is a serious injury. The inquiry, then, must be directed to whether under all the circumstances, such injury is an irreparable injury.

The District Court based its decision on the ground that no irreparable injury existed because there were other remedies. These so-called remedies must, therefore, be considered to ascertain whether they are actually adequate.

(A) The Remedy in The Tax Court.

It is first suggested by the District Court that appellant has an adequate remedy by a petition for redetermination filed in The Tax Court of the United States, and that since The Tax Court may find that appellant realized no excessive profits, this suit is premature and should be dismissed. It is suggested that until the administrative remedy, the petition in The Tax Court, has been exhausted, appellant has no right to maintain this suit.

That appellant had the right to file a petition for redetermination in The Tax Court is admitted. (Renegotiation Act, Sec. 403 (e) (1)). Such a petition was filed. The right to file a petition in The Tax Court, the filing of such petition, and any redetermination made by it is not a remedy. The filing of a petition in The Tax Court does not, and cannot restrain collection, regardless of the unconstitutionality of the law or of an erroneous determination of the Board. The Renegotiation Act expressly provides that the filing of such a petition shall not operate to stay collection of the amount determined by the Board to be "excessive profits" (Sec. 403 (e) (1)). The Tax Court has no power to stay collection pending redeter-

mination. In fact, appellant's experience for the year 1942 would indicate that the filing of a petition in The Tax Court, far from being a remedy, expedites illegal collection. As applied to the year 1942, prior to the filing of the petition in The Tax Court, the Under Secretary of War merely directed the withholding of amounts due appellant by appellant's customers, but after the filing of the petition in The Tax Court by appellant, the Secretary directed payment of the amounts so withheld into the Treasury of the United States.

A remedy is that which prevents an impending injury, or at least redresses a wrong. It is never a mere formality of procedure which is ineffectual to ward off the injury or to redress the wrong. It has been suggested that while the petition in The Tax Court may not ward off the injury, that *after* The Tax Court has made its decision, its decision redresses the wrong. This is not the fact. Long before the decision of the Tax Court has been rendered collections from customers will have been made solely because the Board has made its determination. The Board might be, and in our opinion is, in error both as to the validity of the law and the correctness of the determination. These questions should be determined before further injury is inflicted upon appellant. The 1942 petition in The Tax Court has been pending since May 18, 1944, and appellant has been allowed to do nothing beyond the filing of this petition, but $204,000 of funds due and payable to appellant have been paid into the Treasury of the United States. The 1943 petition, filed in July 1945, probably will be as long delayed. The Tax Court cannot, in our opinion, determine authoritatively the constitutionality of the Renegotiation Act. That is solely the function of this Court. After the decision of The Tax Court has been rendered (even assuming the validity of the law) there is no procedure by which appellant can recover the amount col-

lected, if, as the District Court suggested, The Tax Court should determine that no excessive profits have been realized. In recognition of the absence of a procedure for recovery of amounts illegally collected, an appropriation statute was enacted (First Deficiency Appropriation Act of 1945, Public Law 40, 79th Congress 1st Session), appropriating $15,000,000 for the repayment of improper and excessive renegotiation collections. This appropriation expired in June 1946. Whether succeeding statutes will be enacted is not known. Whether appellant will be assured the same speed in repayment as appellant experienced in collections is not known. Whether interest be allowed is not known. The Renegotiation Act is silent in all of these respects.

The petition in The Tax Court is not a plain, adequate and speedy remedy. The provisions of section 403 (e) that the proceeding in The Tax Court shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding *de novo*, has already been construed as placing the burden on the contractor to show that the determination of the Board is erroneous. (Rule 32 of The Tax Court, *Stein Brothers Mfg. Co.* v. *Secretary of War*, 7 T. C. 864, decided September 26, 1946.) The grim reality known to everyone, is that after long delay, The Tax Court may make a determination that the Act is unconstitutional, or if constitutional that appellant has realized no excessive profits, or has realized excessive profits in an amount much less than that determined by the Board. Possibly at that far future date some device will be in existence for the prompt refunding with interest of the amounts illegally collected. No such device is provided by the Renegotiation Act. Today none exists. Today the loss of an additional $270,000, the work necessary to its recovery, the uncertainty as to a procedure for recovery, and the uncertainty

as to repayment must all be patiently assumed by appellant, because it is alleged to have a remedy, the right to file a petition in The Tax Court for redetermination.

But it will be contended, even if the right to file a petition in The Tax Court is not an adequate remedy, this suit is premature, because this administrative remedy, whether adequate or otherwise, has not been exhausted. In *Macauley* v. *Waterman S.S. Corporation*, 327 U.S. 540, this Court, after reviewing all the possibilities of injury which respondents there suggested might occur, said: (p. 545)

> "Even if one or all of these things might possibly occur in the future, that possibility does not affect the application of the rule requiring exhaustion of administrative remedies."

A remedy, legal or otherwise, is exhausted when the party possessing the remedy has done everything he can possibly do with the remedy to prevent the impending injury. When the further control over the so-called remedy is no longer in his hands, but in the hands of "an independent agency of the Executive Branch of Government" (the statute creating The Tax Court so defines it, 26 U.S.C. 1100), he has no remedy to exhaust. Appellant herein has complied with every requirement of the Renegotiation Act. It promptly submitted all data requested. It attended all conferences to which it was called. It petitioned the Board to review the determination of its delegate, Patterson. It filed its petition in The Tax Court within 90 days after Patterson's decision. When a motion was made to strike that petition because it was filed during the time the Board might initiate a review, it prepared a second petition for filing. After the Board refused to initiate a review of Patterson's determination as its delegate, appellant filed in The Tax Court its second

petition for redetermination. That was the entire remedy given appellant by the Act. Appellant had then done all it could possibly do with the administrative remedy. It had then exhausted the remedy given it.

The decision of the trial court insofar as the doctrine of the exhaustion of administrative remedies is concerned proceeds from an inaccurate understanding of the Renegotiation Act, and of the rule relative to the exhaustion of legal remedies as applied in those cases where statutes of a completely different nature were being considered.

In *Arrow Distilleries* v. *Alexander*, 24 F. Supp. 880, (aff. 306 U.S. 615) upon which decision the District Court relied in the instant case, the Court, quoting from *Myers* v. *Bethlehem Corporation*, 303 U.S. 41, said: (p. 882)

> "Thus a complete administrative remedy is provided.
>
> '*In Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U.S. 41, the Supreme Court said—The long settled rule of judicial administration is 'that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'"

But the District Court has overlooked or misapprehended the nature of the statute involved in that case. In the opinion in the *Arrow* case, it is said (p. 881):

> "From any order suspending, revoking or annulling a permit, an appeal may be taken to the appropriate Circuit Court of Appeals or to the United States Court of Appeals for the District of Columbia; the court is given exclusive jurisdiction to affirm, modify or set aside such order in whole or in part, *and the commencement of proceedings in the Court of Appeals shall, unless specifically ordered by the Court to the contrary, operate as a stay of the administrator's order.* (Section 4 (h), 27 U.S.C.A. Sec. 204 (h).)" (Italics ours.)

In *Myers* v. *Bethlehem Corporation*, 303 U.S. 41, this Court in its opinion said: (p. 48):

> "The grant of that exclusive power is constitutional because the Act provided for appropriate procedure before the Board and in the review by the Circuit Court of Appeals an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board. *No power to enforce an order is conferred upon the Board. To secure enforcement, the Board must apply to a Circuit Court of Appeals for its affirmance. And until the Board's order has been affirmed by the appropriate Circuit Court of Appeals, no penalty accrues for disobeying it.*" (Italics ours.)

In each of those cases, as in others where the statement is made that the administrative remedy must be exhausted before any other procedure may be used, the aggrieved party does not feel the impact of the statute until the final reviewing process has been completed. Under these circumstances he sustains no injury while awaiting the action of the reviewing body. If the Renegotiation Act were that type of statute, appellant would have little cause to complain of the ineffective administrative remedy, or of the application of the rule relating to the exhaustion of administrative remedies. But that is *not* the nature of the Renegotiation Act. Action under the statute is not suspended *pending* the determination of the reviewing body. The reviewing body has no power to suspend action pending redetermination. Exactly the contrary is the fact. Prior to and pending action by the reviewing body, (The Tax Court) and after appellant has done all it can do, the contractor feels the impact of the statute. That is when collection is made by order of the Board. With the doctrine of exhaustion of administrative remedies, applied to statutes under which the orders of administrative bodies are not effective until the review-

ing body has acted, we have no dispute. But that doctrine and its application to those statutes has no similar application to the Renegotiation Act where the injury is sustained prior to and pending the actions of the reviewing body. The collection is not subject to the order of The Tax Court, but occurs prior to and regardless of the action of The Tax Court. The subsequent order of The Tax Court cannot direct repayment.

The distinction existing between the two types of statutes is best presented by the dissenting opinion in the case of *Columbia System* v. *United States,* 316 U.S. 407, when, speaking of the cases cited in the opinion of the Court, it is said: (pp. 433-434)

> "The characteristics of the administrative determinations in all the cases on which the Court's opinion relies were wholly different. In each one the force of the law, either through criminal prosecution or injunction or fine or some other judicial remedy, could immediately be brought to bear to enforce the command of administrative agency. In none of the cases was an administrative action held reviewable which in itself entailed no immediately legal consequences."

It is apparent that a petition in The Tax Court was never intended to be more than a mere formality, which would not and does not protect the contractor. Overlooked, however, were the decisions of this Court as illustrated by the decision in *Porter* v. *Investors Syndicate,* 286 U.S. 461. That case shows the fallacy of the attempted application of the doctrine of exhaustion of administrative remedies to statutes of this type. It reiterates the rule applicable under this type of statute, namely, where the statute is immediately effective on the individual, regardless of the action of the reviewing body, resort may be had to the courts, for the protection of property. In that case recourse was had to a Federal court to enjoin

the enforcement of an order of the Security Commissioners of Montana, revoking a license as a dealer in securities, pending action of the reviewing court. It was there said: (pp. 470, 471)

> "Where as ancillary to the review and correction of administrative action, the state statute provides that the complaining party may have a stay until final decision, there is no deprivation of due process, although the statute in words attributes final and binding character to the initial decision of a board or commissioner. *Pacific Live Stock Co.* v. *Lewis*, 241 U.S. 440, 454. But where either the plain provisions of the statute (*Pacific Tel. Co.* v. *Kuykendall*, 265 U.S. 196, 203, 204) or the decisions of the state courts interpreting the act (*Oklahoma Nat. Gas Co.* v. *Russell*, 261 U.S. 290) preclude a supersedeas or stay until the legislative process is completed by the final action of the reviewing court, due process is not afforded, and in cases where the other requisites of federal jurisdiction exist recourse to a federal court of equity is justified."

That is the rule applicable to statutes such as the Renegotiation Act. That case recognizes the remedy which one may invoke when confronted with the certain injury due to unauthorized acts of an administrative body. Such a remedy may be invoked while the process of administrative review is being completed, in order that irreparable injury may not result.

The second misunderstanding of the doctrine of exhaustion of administrative remedies is based upon the assumption that the remedy is not exhausted until the reviewing agency itself has completed its duties.

In a recent decision of this Court, *Estep* v. *United States*, 327 U.S. 114, this Court speaking of the exhaustion of administrative remedies as applied to the Selective Service Act, said: (p. 123)

> "Here these registrants had pursued their adminis-

> trative remedies to the end. All had been done which could be done. Submission to induction would be satisfaction of the orders of the local boards, not a further step to obtain relief from them."

In this case, appellant has done all that it can do. Upon the filing of appellant's petition in The Tax Court, appellant exhausted its remedy. Submission to the demands of the Board by inaction on appellant's part, would be satisfaction of the order of the Board, but not a further step to obtain relief therefrom.

It may be assumed that the framers of the Renegotiation Act intended to circumscribe the judicial power of the courts and by this legislation, which confers a sterile right of review, to give immediate effect to administrative action. The absence of any form of judicial review would so indicate. But when circumvention of judicial power gives effect to administrative action, beyond the limits of constitutional authority, then the courts of equity have always provided a remedy.

In the concurring opinion of Mr. Justice Murphy in the *Estep* case, it is said: (p. 127)

> "'As this Court has previously said, 'Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority.' *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 52."

The doctrine of exhaustion of administrative remedies was never intended to prevent recourse to a court of equity for relief from a statute such as the Renegotiation Act.

Before attempting to apply the doctrine of exhaustion of administrative remedies to every case where an administrative remedy is provided, consideration must be given to

the nature of the statute, the application of the statute, and the rights involved. There are, in our opinion, four situations which must be considered.

First: There are those cases where the statute itself provides for determination of a court before the party may feel the impact of the statute. In those cases, this court has said that no complaint in equity will lie to test the constitutionality of the questioned act. Of this type of case, the *Myers* and *Arrow Distilleries Co.* cases are typical.

Second: There are statutes where the danger to property rights exists by the very existence of the statute. In such cases, the Court has not been hesitant about granting an injunction, notwithstanding the complainant has never done anything to recognize the administrative process. It is not as the Court below supposed, that because an administrative process exists which may be invoked, but rather whether the appellant is in imminent danger of being ruined by an unconstitutional statute or rule. Of this type of case, *Pierce* v. *Society of Sisters*, 268 U.S. 510, and *Columbia System* v. *United States*, 316 U.S. 407, are typical.

Third: There is the third class of cases where this court has recognized that although administrative review is authorized and not availed of, injunction may be granted by courts, because the review provided is said to be a mere formality. Of this type the cases of *Levers* v. *Anderson*, 326 U. S. 219; *United States* v. *Abilene & Southern Co.*, 265 U. S. 274, and *Prendergast* v. *N. Y. Tel. Co.*, 262 U. S. 43, are typical.

Fourth: There are those statutes where, during the appellate administrative process, and prior to the issuance of the final command, the party feels the impact of the statute. In such cases, the court will restrain the ad-

ministrative order, so that the party will be spared until the process shall have been completed. Of this type of case, *Porter* v. *Investors Syndicate*, 286 U.S. 461, is typical.

In *Yakus* v. *United States*, 321 U. S. 414, 438, it was said:

> "The denial of a right to a restraining order or interlocutory injunction to one who has failed to apply for available administrative relief, *not shown to be inadequate* is not a denial of due process," citing *Natural Gas Co.* v. *Slattery*, 302 U. S. 300. (Italics ours.)

If the statute provides that the individual may receive the impact of the first administrative determination while he is invoking the second, such remedy is inadequate. If the statute also precludes him from the protection of the Court while he is so acting, that statute does not provide due process.

(B) The remedy in the Court of Claims.

In the opinion of the District Court, it is suggested "that as to any liability on the United States, its (appellant's) remedy is in the Court of Claims." Unlike the Royalty Adjustment Act which was before this Court in *Coffman* v. *Breeze Corporations*, 323 U.S. 316, which the District Court cited, appellant has no right in the Court of Claims. A careful reading of the Renegotiation Act fails to disclose any reference to a contractor's or subcontractor's right in the Court of Claims. Indeed, it would appear that any right which might have existed prior to February 25, 1944, to resort to the Court of Claims, was expressly taken away from the individual by the Renegotiation Act.

Section 403 (e) (1) of the Renegotiation Act provides in part as follows:

"Upon such filing (of a petition in The Tax Court) such court shall have exclusive jurisdiction by order to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor and such determination shall not be reviewed or redetermined by any court or agency." (Portion in parentheses supplied by us.)

Even if the reference in the opinion of the District Court to the Court of Claims, be assumed to refer to amounts paid into the Treasury of the United States by customers of appellant under directions of the Secretary of War (as occurred in the 1942 renegotiation and as will occur again in the 1943 renegotiation unless the injunction issue), it is impossible to see how such a procedure could be said to be a plain, speedy and adequate remedy.

Before any amount could be said to be due appellant for which a claim could be asserted in the Court of Claims (if one could ever be asserted there), The Tax Court would be required to have made a determination. But long *before* the Tax Court acts, collection will have been made. Only long *after* The Tax Court acts could resort be had to the Court of Claims. The so-called remedy in The Court of Claims is one full step *behind* the so-called remedy in The Tax Court. All that was said before as to the ineffectiveness of the petition in The Tax Court applies to a proceeding in the Court of Claims, if one could be maintained there.

(C) The right to maintain a suit at law against appellant's debtors.

It was suggested by the court below that appellant has a complete remedy at law in that it may maintain suits against its several debtor customers for the amounts due upon their respective accounts. It said, "these debtors are not numerous and so far as the plaintiff being entitled to relief to avoid a multiplicity of suits, it has a complete remedy in the Court of Claims for all sums of which it may be deprived if the Renegotiation Act is unconstitutional."

As previously shown, there is no right whatsoever to appear in the Court of Claims.

While it is not known what the District Court meant by the statement that appellant's debtors are not numerous, it appears from the affidavits filed in this cause that to recover $270,000 appellant would be required to sue sixteen or more of its customers. (R. 132)

The institution of several suits in several jurisdictions will require the employment of additional attorneys. It will require additional traveling and the expenses incidental thereto, and, more important, it will require the time and attention of appellant's executive officers. This Court certainly knows that the cost of attorneys' fees, stenographic fees, traveling expenses and other expenses which will be inevitable in the trials of sixteen or more cases, are costs which are not recoverable. The loss which will inure to appellant by reason of the diversion of its executives' time and energies is neither calculable nor recoverable. To say that this case should not be entertained because appellant will not suffer irre-

parable injuries on this score, when this proceeding in equity would speedily and conclusively determine the issues, is to deny one of the historic reasons for the existence of equity.

More serious, however, is the effect of those sixteen suits. These debtor customers of appellant have never denied their indebtedness to appellant for the merchandise furnished them. The customers of appellant, who in July, 1944 paid into the Treasury of the United States $204,000 which they owed appellant, believe that they have discharged their obligation to appellant. When new debtor customers pay into the Treasury of the United States, upon the direction of the Secretary of War, an additional $270,000 due appellant, they, in their opinion, will be discharging their obligations to appellant. None of these customers has any interest in the constitutionality of the Renegotiation Act, or in its operation upon appellant. They do have a real interest in not being a defendant in a suit instituted against them by appellant to recover money which in their opinion they have paid. The time of their officers and of their attorneys is valuable, and to devote any part of that time and effort to a dispute between the War Contracts Price Adjustment Board and appellant is neither their duty nor their desire. Their natural reaction can be only one; to cease doing business with Aircraft & Diesel Equipment Corporation. If the controversy between appellant and the Board cannot be determined without customers being subjected to suits (which appellant does not desire to institute), then there will be no customers. Then is the time when appellant will sustain additional injury. The extent of that injury, while certain and substantial, cannot now be determined. Good will, friendly relations, satisfied customers are not to be lightly cast aside. They are the life of a business. Appellant could have maintained a suit in 1944 against the cus-

tomers for the $204,000 but what would have been the consequences of such a suit to appellant? To be deprived of $204,000 of its funds was to sustain a substantial injury; to be deprived of an additional $270,000 is to sustain further injury, but to be required to sue its customers because of the unauthorized acts of a governmental agency as the means of determining the legality of the action taken by such agency, is to be required to sustain irreparable injury. In the business world one does not knowingly kill the goose that lays the golden egg. The alleged remedy by suit against customers is more destructive than the injury. No sane businessman would voluntarily use such a remedy. No individual should be required to use such a procedure to determine a question of great public importance.

That the three suggested remedies are wholly inadequate is apparent from careful consideration of those remedies.

(D) Appellant will sustain irreparable injury if the injunction be not granted.

Notwithstanding the differences between the Renegotiation Act and those statutes where the effect of the statute is not felt until the reviewing agency has acted, and notwithstanding the inadequacy of the suggested remedies, it will be contended that appellant is not entitled to have the constitutionality of the Renegotiation Act determined in this proceeding. It will be asserted that since appellant knows the exact amount of money taken from its customers it can sue such customers for the respective amounts paid by them into the Treasury and in such proceedings determine the unconstitutionality of the Act. This contention requires the recognition of a most novel proposition of law: that if A commits a wrong

against B, B is without a remedy against A because B may sue C and recover from C the amount which A unlawfully caused to be taken from B. If the first act be unconstitutional, or the Secretary of War acted beyond his powers, then he, stripped of the protection of the Act, wrongfully caused customers of appellant to break contracts with the appellant. If the Renegotiation Act is unconstitutional, the Secretary of War is about to commit a second wrong of a similar nature. For each of those wrongs, the wrongdoer himself must assume full responsibility, and not attempt to avoid that responsibility by asserting that a right exists in the appellant to sue one who has committed no offense and whose only act consists in compliance with an order of one in apparent authority.

In *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575, quoting from *Sloan Shipyards Corp.* v. *Emergency Fleet Corp.*, 258 U.S. 549, 566, 567, it is said: (p. 584)

> "If one be sued for conduct harmful to plaintiff his only shield is a constitutional rule of law that exonerates him."

Appellant's loss, if it is compelled to sue its customers, is not alone in the $270,000 paid into the Treasury of the United States. Its loss is not $270,000 plus the expenses incurred in the several suits, and plus interest from the date of payment into the Treasury. In addition to the loss of its money, the costs of such suits, and the necessary delay incurred, appellant's real loss, if it be compelled to sue customers, is much more substantial than that, although incapable of exact ascertainment. The loss which the appellant will sustain is the loss of the customers themselves.

This Court has recognized, in at least three cases, that a law which disturbs the business relations between a complainant and its customers, so that the customers will

cease to be customers, creates such irreparable injury that an injunction should be granted to prevent such loss. These cases are *American Federation of Labor et al.* v. *Watson*, 327 U.S. 582, *Pierce* v. *Society of Sisters*, 268 U.S. 510 and *Columbia System* v. *United States*, 316 U.S. 407. In view of these decisions, it is not sufficient to do, as the District Court did, rely upon cases such as the *Myers* case or the *Arrow Distilleries* case, since in those cases the Court was not only dealing with a different type of statute, but with a situation where the denial of the injunction did not result in the destruction of a business. Had the complainant in the *Myers* and *Arrow* cases pursued the adminstrative remedies provided by the statutes questioned in those cases, they could have had a determination of all the questions before they had sustained any such loss as will be sustained by appellant in this case.

It is respectfully submitted that this Court will not require the appellant to sustain irreparable injury in the destruction of its business, by withholding injunctive relief, when, by that relief only, can appellant avoid the certainty of irreparable injury.

CONCLUSION.

In the foregoing pages of this brief we have shown that the renegotiation acts violate the provisions of Article I, section 1, Article III, sections 1 and 2, of the Constitution of the United States and violate the provisions of the Fifth, Seventh and Tenth Amendments thereto. We have also shown that in the action proposed to be taken, appellant will sustain an irreparable injury.

In our opinion no case has arisen recently in which questions of greater importance are presented than those in this litigation. These questions are of importance not only to the appellant and to contractors generally, who are contesting in the Tax Court of the United States, and elsewhere, the various determinations made by the Secretaries and by the War Contracts Price Adjustment Board, but to the general public which recognizes the extent of the doctrine enunciated by the renegotiation acts.

Appellant has been criticized by appellees for prosecuting this suit for the alleged reason that such action on appellant's part interferes with the prosecution of the war and permits war profiteering to take its uncontrolled course. This observation is unwarranted and unjustified. Appellant is not a war profiteer. Had appellant overcharged its Government, or had it charged its Government more for materials than it charged other contractors, a consciousness of guilt would have restrained appellant's action. As it is, appellant has the firm conviction that its action is morally and legally justified. Appellant does not believe that it is within the powers of the Congress to vest in an administrative agency the sole and arbitrary power of determining what profits any individual contractor may retain. This does not mean that appellant denies the power of the Congress exercised within con-

stitutional limits, to do with men, women and property whatever may be necessary and requisite to effectually prosecute a war. Appellant does contend, however, that those great and necessary powers shall not be used, under the pressure of war, to deprive the citizens of the rights established and guaranteed by the Constitution of the United States.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946

No. 95

AIRCRAFT & DIESEL EQUIPMENT CORPORATION,
Appellant,

vs.

MAURICE HIRSCH, E. D. McDOUGAL, JOHN R. PAUL, *et al.*,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

APPENDIX TO THE BRIEF FOR APPELLANT.

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EXCERPTS FROM 88 CONGRESSIONAL RECORD VOLUME III.

Proceedings in the Senate, April 7, 1942.

(p. 3387)

"The Presiding Officer. The amendment should be read as set forth in the notice.

The Chief Clerk read as follows:

Sec. 403 (a) For the purpose of this section • • •

(b) The Secretary of each Department is authorized and directed to insert in any contract for an amount in excess of $100,000 hereafter made by such Department (1) a provision for the renegotiation of the contract price at a period when the profits can be determined with reasonable certainty; (2) a provision for the retention by the United States or the repayment to the United States of (A) *any amount of the contract price which is deemed by the Secretary to represent excessive profits* and (B) an amount of the contract price equal to the amount of the reduction in the contract price of any subcontract under such contract pursuant to the renegotiation of such subcontract as provided in clause (3) of this subsection; and (3) a provision requiring the contractor to insert in each subcontract for an amount in excess of $100,000 made by him under such contract (A) a provision for the renegotiation by such Secretary and the subcontractor of the contract price of the subcontract at a period when the profits can be determined with reasonable certainty, (B) a provision for the retention by the United States or the repayment to the United States of any amount of the contract price of the subcontract which is *deemed by the Secretary* to represent excessive profits, and (C) a provision for relieving the contractor from any liability to the subcontractor on account of any amount so retained by or repaid to the United States.

(c) The Secretary of each Department is authorized and directed, whenever in his opinion excessive profits have been realized, or are likely to be realized, from any contract with such Department, (1) to require the contractor to renegotiate the contract price, (2) to withhold from the contractor any amount of the contract

price *which is deemed by the Secretary* to represent excessive profits, and (3) in case any amount of the contract price *deemed by the Secretary to represent excessive profits shall have been paid to the contractor.* * * *

SCHEDULE OF MAXIMUM PROFITS RATES.

Ten per cent of so much of the contract price as does not exceed $100,000 plus.

Eight per cent of so much of the contract price as exceeds $100,000 but does not exceed $500,000; plus

Six per cent of so much of the contract price as exceeds $500,000 but does not exceed $1,000,000; plus

Five per cent of so much of the contract price as exceeds $1,000,000 but does not exceed $5,000,000; plus

Four per cent of so much of the contract price as exceeds $5,000,000 but does not exceed $20,000,000; plus

Three per cent of so much of the contract price as exceeds $20,000,000 but does not exceed $50,000,000; plus

Two per cent of so much of the contract price as exceeds $50,000,000.

Proceedings in the House of Representatives
April 21, 1942

(p. 3582)

The Speaker. The Clerk will report the next amendment in disagreement.

The Clerk read as follows:

Amendment No. 74: Page 47, line 12, strike out all of lines 12 to 19 inclusive and insert in lieu thereof the following:

'Sec. 403. (a) For the purpose of this section, the term "Department" means * * *

(p. 3582)

'(c) The Secretary of each Department is authorized and directed, whenever in his

(p. 3583)

opinion excessive profits have been realized, or are likely to be realized, from any contract with such Department, (1) to require the contractor *to renegotiate the contract price*, (2) to withhold from the contractor any amount of the contract price *which* is deemed by the Secretary to represent excessive profits.' • • •

(p. 3583)

Mr. Cannon of Missouri. Mr. Speaker, I move that the House recede from its disagreement to the amendment of the Senate numbered 74 and agree to the same with an amendment, as follows:

In lieu of the matter inserted by such amendment, insert the following:

'Sec. 403. (a) For the purposes of this section, the term "Department" • • •

'(c) The Secretary of each Department is authorized and directed, whenever in his opinion excessive profits have been realized, or are likely to be realized, from any contract with such Department or from any subcontract thereunder, (1) *to require the contractor or subcontractor to renegotiate the contact price*, (2) to withhold from the contractor or subcontractor any amount of the contract price which is found *as a result of such renegotiation* to represent excessive profits, and (3) in case any amount of the contract price found *as a result of such renegotiation* to represent excessive profits shall have been paid to the contractor or subcontractor, to recover such amount from such contractor or subcontractor.' • • •

(p. 3585)

Mr. Vinson of Georgia. • • •

The House itself started this legislation by adopting a profit limitation which I think everyone will agree is unworkable, and if left in the bill would probably have more harmful results than good. I say that in deference to the sincerity of the distinguished gentleman from South Dakota. The Senate struck out the House limitation and inserted a provision seeking to deal with excess profits through renegotiation of contracts. This provision was defective in that it also sought to deal with the problem of excessive profits on a contract basis without regard to the contractors' net profits for the year. It also was unacceptable in that it delegated to the various department heads the absolute and unlimited authority to determine what constituted excessive profits, without providing any standards for the assurance of the contractor and the guidance of the department head.

The conferees are bringing before the House a substitute which amends the Senate provision and leaves the question of excessive profits to be determined *entirely by mutual agreement of the contractor and the department* concerned through renegotiation of the contract. *This is no more nor no less than a restatement of existing departmental practice.*

The Naval Affairs Committee has given a great deal of study to the question of excessive war profits. It now has under consideration a bill which I feel deals more adequately, effectively, and comprehensively with this subject of war profits. These hearings have established that any plan for the recapture of excessive profits on war contracts, first, must contain ample authority to reach excessive profits of uncooperative contractors; second, must establish fair and reasonable standards for the as-

surance of the contractor and the guidance of the department head; third, must provide uniformity of treatment for all persons under substantially the same circumstances; and, fourth, must allow a fair return to the contractor on an annual basis.

None of the proposals before the House today meet these requirements. * * *

Mr. Tarver. Mr. Speaker, will the gentleman yield?

Mr. Vinson of Georgia. I yield to the gentleman from Georgia.

Mr. Tarver. If the gentleman's statement is correct—and I may say I am in full accord with him—then why should the House go through the futile motion of adopting this amendment? Why not reject the whole thing rather than have the people of the country believe we are undertaking to legislate on this question, when we are, in fact, not accomplishing anything?

Mr. Vinson of Georgia. That is a very practical question. Here is an appropriation bill involving some $19,000,000,000. The Army and Navy demand that it be passed as speedily as possible. * * *

(p. 3595)

Mr. Case of South Dakota. * * *

(p. 3596)

Now, then, I certainly hope that the Naval Affairs Committee, or some committee, does come in and give the Congress an opportunity to redeem the promise that every Member here has made at some time to his constituency, that he is in favor of taking the profits out of war. Let us not suggest to anybody that this amendment really does that. It does not go that far. It merely gives the departments an opportunity to renegotiate before final payment has been made. * * *"

Proceedings in the Senate, April 23, 1942

(p. 3648)

"The President pro tempore. The Chair lays before the Senate a message from the House which will be read.

The Chief Clerk read as follows:

• • •

That the House recede from its disagreement to the amendment of the Senate numbered 74 to said bill and concur therein with an amendment as follows: In lieu of the matter inserted by said amendment insert:

'Sec. 403. (a) For the purposes of this section, the term "Department" means the War Department, the Navy Department, and the Maritime Commission, respectively; in the case of Maritime Commission, the term "Secretary" means the Chairman of such Commission; and the terms "renegotiate" and "renegotiation" include the refixing by the Secretary of the Department of the contract price.' For the purposes of subsections (d) and (e) of this section, the term "contract" includes a subcontract,' and the term "contractor" includes a subcontractor—

"(b) The Secretary of each Department is authorized and directed to insert in any contract for an amount in excess of $100,000 hereafter made by such Department (1) a provision for the renegotiation of the contract price at a period or periods, when, in the judgment of the Secretary, the profits can be determined with reasonable certainty; (2) a provision for the retention by the United States or the repayment to the United States of (A) any amount of the contract price which is found as a result of such renegotiation to represent excessive profits and (B) an amount of the contract price equal to the amount of the reduction in the contract price of any subcontract under such contract pursuant to the renegotiation of such

subcontract as provided in clause (3) of this subsection; and (3) a provision requiring the contractor to insert in each subcontract for an amount in excess of $100,000 made by him under such contract (A) a provision for the renegotiation by such Secretary and the subcontractor of the contract price of the subcontract at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty, (B) a provision for the retention by the United States or the repayment to the United States of any amount of the conract price of the subcontract which is found as a result of such renegotiation, to represent excessive profits, and (C) a provision for relieving the contractor from any liability to the subcontractor on account of any amount so retained by or repaid to the United States.

• • •

(pp. 3649-3650)

Mr. Vandenberg. In the process of renegotiation to which the Senator refers, what is the objective? Is there any criterion or yardstick?

Mr. McKellar. There is no yardstick except as to excessive costs. Let me read the amendment to the Senator. The first subdivision covers definitions, and it is not necessary that I read that. The second subdivision reads:

(b) The secretary of each department is authorized and directed to insert in any contract for an amount in excess of $100,000 hereafter made by such Department (1) a provision for the renegotiation of the contract price at a period or periods when, in the judgment of the secretary, the profits can be determined with reasonable certainty; (2) a provision for the retention by the United States or the repayment to the United States of (A) any amount of the contract price which is found as a result of such renegotiation to represent excessive profits and (B) an amount of the contract price equal to the amount

of the reduction in the contract price of any subcontract under such contract pursuant to the renegotiation of such subcontract—

This applies not only to contracts but to subcontracts—as provided in clause (3) of this subsection; and (3) a provision requiring the contractor to insert in each subcontract for an amount in excess of $100,000 made by him under such contract (A) a provision for the renegotiation by such secretary and the subcontractor.

In other words, it is left to the Secretary of War, as to military contracts; the Secretary of the Navy as to naval contracts; or to the Maritime Commission as to maritime contracts—

Mr. Vandenberg. To determine what is an excessive profit?

Mr. McKellar. To determine what is an excessive profit. The contention that there should be a percentage limitation was not agreed to, because it was believed by these three departments that if a general percentage reduction were established, it would slow down production.

• • •

(p. 3650)

Mr. Vandenberg. Does the conclusion of the Government department as to what is an excessive profit become binding on the contractor, or must there be an agreement between the department and the contractor?

Mr. McKellar. The contract has to be renegotiated, but it will be seen that the head of the department has a tremendous—

Mr. Vandenberg. Leverage?

Mr. McKellar. Leverage; and I believe he will exercise it properly in all cases; indeed, I think it will mean the saving of tremendous sums.

Mr. Vandenberg. I think it has already had that result, through the renegotiation of other contracts; but what I am trying to establish is the fact itself, and the fact is, as I understand, that the identification of an excessive profit will require the consent of the contractor.

Mr. McKellar. Of course.

• • •

(p. 3650)

Mr. Overton. I wish to ask the Senator from Tennessee whether the amendment adopted by the Senate armed the Secretary of War, the Secretary of the Navy, and the Chairman of the Maritime Commission with the authority, in the renegotiation of a contract, to determine what excess profits there are, and whether it gave the United States Government the right to retain any excess profits found by these officers, or the right to sue for excess profits found to exist by the officers concerned?

Mr. McKellar. That is entirely true.

Mr. Overton. That is what the Senate amendment provided?

Mr. McKellar. That is entirely true.

Mr. Overton. The substitute amendment proposed by the conferees takes that authority from the Secretaries, denies the Federal Government the right to sue for any excess profits which the secretaries may find, and gives the Federal Government th right of recovery, either by retention or recapture of excess profits, only when the contractor himself agrees that there has been an excess profit. There must be a meeting of the minds. A contractor himself must admit, by signing a renegotiated price agreement, that he has made excess profits, before the Federal Government has any right either of retention or of recovery.

Mr. McKellar. The Senator is correct. That amendment was made in the conference.

Mr. Taft. Mr. President, will the Senator yield?

Mr. McKellar. I yield.

Mr. Taft. I question the statement made by the Senator from Louisiana.

Mr. McKellar. He is in part correct, and in part not entirely correct, as I shall explain; but I yield to the Senator.

Mr. Taft. I only wished to suggest that the words "to negotiate" are ambiguous. Ordinarily they would seem to imply that a renegotiation could not be reached unless both sides should agree. Section 403 (a) provides:

> the terms "renegotiate" and "renegotiation" include the refixing by the Secretary of the Department of the contract price.

So it seems to me clear that this proposal is to give absolute power to the secretary to reopen any contract and to fix any price he sees fit to fix.

Mr. Overton. Mr. President, will the Senator further yield?

Mr. McKellar. Let me say a word, and then I will yield to the Senator.

The committee was convinced that the word "renegotiate" would imply such authority in the first place; but we sought to remove all doubt by putting in the definition of "renegotiation" the power to fix the contract price. So it seems to me that while there must be a negotiation in every case between the contractor and the Government, in the end the Government has the right to fix the amount of profit and to withhold excess profits. In my opinion the result is one of the most helpful measures which we could pass.

I now yield to the Senator from Louisiana.

Mr. Overton. I do not think there is any doubt what-

soever as to the construction placed by the conferees on the proposed substitute. As the Senator will recall, in the conference it was insisted that the authority of the Secretary to determine what excess profits existed, should be taken away from him, and that no contractor should be made liable unless he himself agreed that there was an excess profit. So, in order to achieve that result, this one clause was inserted throughout the provisions of the substitute—

Mr. McKellar. From what section is the Senator reading?

Mr. Overton. It occurs throughout the section. It is provided that there shall be a provision in each contract for the retention by the United States or the repayment to the United States of—

> any amount of the contract price which is found as a result of such renegotiation to represent excessive profits.

That was substituted for the words:

> any amount of the contract price which is deemed by the Secretary to represent such excessive profits.

It was proposed in the conference that after the word "found" there should be inserted the words "by the Secretary." That proposed amendment to the substitute was rejected because it was the purpose of the conference that there should be no recovery on the part of the Federal Government unless the contractor himself agreed, in a contract of

(p. 3651)

renegotiation, that excess profits had been obtained by him or were likely to be obtained.

Mr. McKellar. I distinctly remember that the Senator from Louisiana offered an amendment to insert the words "by the Secretary." In my judgment, those words were

left out because they were immaterial. They would leave the contractor out entirely. He ought to be included. Provision was made to renegotiate and to refix the price according to the definition of "renegotiation"; and we felt that the practical effect of what we adopted would be to give the Secretary the right, in the end, to force his way. He would have the whip hand. No contractor would disagree over a matter if he knew that that would end his business. In my judgment, the provision is very much better as it is than it would be if the words "by the Secretary" were inserted.

Mr. Vandenberg. Mr. President, will the Senator yield?

Mr. McKellar. I yield.

Mr. Vandenberg. The Senator is now saying that the Secretary would have collateral powers of persuasion to affect the conclusion. Of course, that is undoubtedly true; but what is the textual fact in respect to the conference report? My original question has been answered both ways.

Mr. McKellar. I have not answered it both ways.

Mr. Vandenberg. The question is, Is the consent of the contractor necessary in order to identify an excessive profit? The Senator from Louisiana says "Yes." The Senator from Ohio says "No." The Senator from Tennessee says "Yes and no." What is the answer?

Mr. McKellar. I do not say "Yes and no." I say that the practical effect of the provision would be, first, to cause a renegotiation and an agreement, if possible. In the event there should not be an agreement, under this provision the Secretary would be required to take further steps. What would he do? He would fix the amount of the excessive profits and would withhold payment. Then it would be a matter for the courts to decide. It will be

remembered that when the amendment was originally before the Senate the distinguished Senator from Connecticut (Mr. Danaher) called attention to the fact that the bill contained a provision which would prohibit a contractor from going into the courts. As a result of the amendment of the Senator from Connecticut, that provision was stricken out. When it was stricken out, the language was left in such shape that the Secretary could pass upon the question, and if the contractor did not like the decision of the Secretary, he could go into court and endeavor to have it overruled.

The Senator from Michigan says that I answered "Yes and no." I think the Senator is mistaken. If I answered "Yes and no," I was mistaken. I am not in the habit of answering "Yes and no" to anybody. I answered in accordance with my understanding. In this case I know I am right, because if the Secretary holds, with respect to any contract, that a certain amount of profit should be regarded as excessive, he has the right to enforce his decision by withholding payment from the contractor, and the contractor may then go into court and have the matter settled.

Mr. Vandenberg. Mr. President, will the Senator yield?

Mr. McKellar. I yield.

Mr. Vandenberg. The answer is that the consent of the contractor is not required to identify an excessive profit, although one of the conferees says it is.

Mr. McKellar. He is required to negotiate. Two negotiators may differ.

Mr. Vandenberg. Just as the conferees seem to differ at the moment.

Mr. McKellar. Yes; but the Secretary has the right to pass upon the question in the way I have explained.

Mr. Overton. Mr. President, will the Senator yield?

Mr. McKellar. I yield.

Mr. Overton. I wish to quote the exact language of the substitute amendment suggested by the conferees in that connection. I call the attention of the Senator from Michigan to what I am about to read. I think there will be no question whatever as to what the answer to the question propounded by the Senator from Michigan should be.

Mr. Vandenberg. Does the Senator mean that the Senator from Tennessee is mistaken in his construction?

Mr. Overton. In my opinion he is mistaken.

Mr. Vandenberg. The Senator from Louisiana was one of the conferees on this bill, was he not?

Mr. Overton. I was one of the conferees. It is not a question of what the Senator from Tennessee or the Senator from Louisiana thinks. The language is so clear as to remove any doubt whatsoever as to the construction which should be placed upon it.

Mr. Vandenberg. If it does not remove the doubt of the Senator from Tennessee I do not know why it should be expected to remove the doubts of the taxpayer, who must live under this formula.

Mr. Overton. If the Senator from Michigan will withhold any comments until I can place before his clear and analytical mind the exact provision, he may arrive at an independent judgment, which I am sure will be correct. The language to which I refer is:

> (c) The Secretary of each Department is authorized and directed, whenever in his opinion excessive profits have been realized, or are likely to be realized, from any contract with such Department or from any subcontract thereunder, (1) to require the contractor or subcontractor to renegotiate the contract price, (2) to withhold from the contractor or subcontractor any

amount of the contract price which is found as a result of such renegotiation to represent excessive profits.

He may not withhold any amount representing excess profits unless those excess profits have been found as a result of the renegotiation between the contractor and the Secretary. So it is perfectly obvious that it must be by mutual consent.

Mr. Vandenberg. Mr. President, will the Senator yield?

Mr. McKellar. I yield.

Mr. Vandenberg. It seems to me that the Senator's statement is very persuasive; yet he seems to be overruled by the majority of his colleagues who joined in writing the formula. I was wondering if we could not give the ultimate taxpayer a little more assurance as to what are his rights and whether the Senate cannot know whether it is limiting profits.

Mr. McKellar. I do not think there is any doubt about the right of the contractor. If the contractor is displeased with what is done he may go into court and sue the Government for the money. That is provided in this bill or in other laws. If the Government is dissatisfied it can retain the alleged excessive profits. The Secretary can withhold payment. It is a very effective measure.

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(p. 3652)

Mr. Shipstead. I wish to ask only one or two questions. Is any definition of excess profits contained in the report?

Mr. McKellar. No; and there ought not to be. We do not want to put in the bill anything that will slow down production. It is one thing to prevent or recover any excess profits, but we do not want to slow down production. The Departments were of the opinion that this

provision would not slow down production, but would save excessive profits. That is why we have agreed to it.

Mr. Shipstead. Then, as I understand, decision as to the question of excess profits is left entirely to the conscience of the Secretary. Is that correct?

Mr. McKellar. The conscience of the Secretary of War, the Secretary of the Navy, or the Chairman of the Maritime Commission.

Mr. Shipstead. Is it not a fact that the fixing of excess profits will be done according to the consciences of the various Secretaries?

Mr. McKellar. Yes, sir; that is correct.

• • • •

(p. 3652)

Mr. Danaher. At that time, obviously, they may agree or they may fail to agree. If they do agree, then subclause (2) comes into effect in the event the contract has not already been completed. Is not that so?

Mr. McKellar. I do not think the Senator has correctly interpreted that provision. It is true that the contractor or subcontractor may be required to renegotiate the contract price but sub-clause (2) is not dependant on that. To withhold part of the contract price is within the power of the Secretary. The provision is a direction to him to withhold it; and I think that provision is quite as important as the first one. I think it is quite as important to withhold from the contractor or subcontractor any amount of the contract price which is found, as a result of such renegotiation, to represent excessive profits.

• • •

Mr. Danaher. We amended it so that the contractor had a right—

Mr. McKellar. So that the contractor had a right to sue, and the Government had a right to sue.

Mr. Danaher. And there is not any longer any question in anybody's mind that the contractor does have a right to go into court to determine whether a proper measure of damages, let us say, has been applied in a particular case?

Mr. McKellar. None whatsoever.

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(p. 3653)

Mr. McKellar. Such contracts are in a different situation, and, of course, if the determination is wrong in any way, the contractor will have a right to go before the courts and have the matter adjusted.

• • •

Mr. Taft. Referring again to this controversial section (c), the Secretary is given power—

> to withhold from the contractor or subcontractor any amount of the contract price which is found as a result of such renegotiation to represent excessive profits.

Will the Senator tell me, found by whom?

Mr. McKellar. The provision does not say.

Mr. Taft. It does not say. That is why I asked whether the Senator can interpret that provision. Does it mean found by the Secretary?

Mr. McKellar. Unquestionably.

Mr. Taft. Or does it mean found by agreement?

Mr. McKellar. In my judgment, the Secretary will agree with the contractor whenever it is possible; but when he makes a finding, a contractor who is dissatisfied with it will have to exercise his right to go into court.

Mr. Taft. It does not do a contractor any good to go into court.

Mr. McKellar. Yes, it does, if he has a just case. If the Secretary of War, for instance, has held certain profits to be excessive when they are not in fact excessive, of course, the contractor has a right to go into court, and I think he will get relief.

Mr. Taft. I do not see why. The Secretary is given absolute discretion to find what are excessive profits. He may say that 1 per cent is excessive, or any amount over 1 per cent. No right is here given the court to overrule the Secretary of War as to what may be excessive profits.

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(p. 3653)

Mr. Pepper. Is there anything in the record of either the debate in the Senate as the Senator recalls it or in the discussions of the conferees that indicates anything in the nature of a standard or a principle which might guide the Secretaries in the administration of this proposed law?

Mr. McKellar. No, sir.

Mr. Pepper. There is no provision as to 6 per cent or 8 per cent?

Mr. McKellar. The Senator, I take it, has reference to a standard fixing a percentage of profits that a contractor may be permitted to make?

Mr. Pepper. Yes.

Mr. McKellar. There is nothing of that kind at all. That was eliminated from the bill, and does not now appear in the bill.

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(p. 3655)

Mr. Overton. • • • My reason for not agreeing to the substitute amendment proposed by the conferees is that

it does not grant one item of authority to the Secretary of the Navy or the Secretary of War or the Chairman of the Maritime Commission which is not already possessed by those officials. It does not give one additional right to the Federal Government which it does not already possess. It does not afford any remedy on the part of the Federal Government against any contractor who is making unconscionable profits which the Federal Government does not already possess. So, while it does not do any good, at the same time I think I can say it does not do any harm. It is merely a restatement of practices which are now being engaged in by the heads of the departments concerned.

The amendment which was adopted by the Senate was an effective amendment; it did give authority to the Secretaries which they do not now possess; it did give rights to the Federal Government which the Federal Government does not now possess. The amendment adopted by the Senate gave the Secretary of each department the right to provide in each contract for the renegotiation of the contract price. It also provided that the contract should contain a clause for the retention by the United States or the repayment to the United States of any amount of the contract price "which is deemed by the Secretary"—I repeat those words—"which is deemed by the Secretary to represent excess profits."

Mr. Walsh. Mr. President, will the Senator from Louisiana yield?

Mr. Overton. I yield.

Mr. Walsh. I gather from what the Senator from Louisiana states that he is disappointed at the provisions of the amendment he has been discussing because there is no yardstick; there is no way for an administrative official or for the public to know where legitimate

profits begin on war contracts and what are and may be construed to be excessive profits. In general, is that the Senator's position?

(p. 3656)

Mr. Overton. No; that is not the contention I am making. The contention I am making is that this amendment does not give any authority to the Secretary which the Secretary does not already possess.

Mr. Walsh. Let me put it this way: Does the Senator know of any existing law which attempts to determine profit limitations, so that the public and the administrative officials may know what is the line of demarcation between legitimate profits and excess profits?

Mr. Overton. There is no law providing any yardstick in that connection.

Mr. Walsh. Let me ask another question: Has the Senator, as a member of his committee, had the experience which I have had of finding the executive officers of the various departments apparently—and I think sincerely—desirous of fixing a limit upon profits, and agreeing with efforts to do so, but unable to furnish any practical proposals which would squarely meet the issue?

Mr. Overton. We undertook to solve that problem in the amendment, which was adopted by the Senate, by vesting authority in the Secretary of War, the Secretary of the Navy, and the Chairman of the Maritime Commission to determine what are excessive profits. It may be said that that is an improper enlargement of authority, since the Secretary represents the Government, which is one party to the contract, and that one party to the contract should not have the right to determine what are excessive profits. The answer to that is that in the absence of any yardstick—and I agree with the Senator from

Massachusetts that it is very difficult to establish a yardstick by statute—there ought to be some tribunal to determine what are excessive profits, and to determine it speedily. Therefore, the Senate proposed to vest that authority in the Secretaries—constituting a tribunal to determine what are excessive profits.

The other answer is that if the contractor is aggrieved he has his remedy in the courts.

Mr. Walsh. I think we all appreciate the extreme difficulty of drafting legislation dealing with the subject. It has been disappointing to me to find that the officials who are actually making the contracts—those who have had experience under war contracts and those who have knowledge of large profits—have not been able—I do not say they are unwilling—to give us concrete suggestions.

My committee has proposed some amendments and sent them to the Departments, and invariably there has been some criticism, which is understandable, to the effect that such proposals might interfere with the production of war materials. I have not been able to get any constructive suggestion from the Department heads in an effort to solve this problem.

I do not say that in criticism. It is partly due to the fact that the department heads think that this subject is our responsibility. I wish to make it clear that the whole discussion of this subject, in which we are all so vitally interested, has been made difficult for the Congress by reason of the absence of suggestions from the administrative officials and their enthusiastic support of some amendment.

Mr. Overton. I do not think that the substitute amendment proposed by the conferees would be at all effective. I think it would accomplish absolutely nothing, and I shall undertake to show why in a moment.

Mr. Walsh. I regret to say that I share the Senator's opinion that it would not be effective. It would not be strong enough, and it would be disappointing to the American public, although in view of my own experience I think the committee deserves to be commended for making an effort, even if a weak effort, to limit war profits.

Mr. Overton. There was a very earnest effort on the part of the Senate committee, the House committee dealing with the subject, and the conference committee, to undertake to solve the problem. I am simply taking the position that the problem is not at all solved. The solution, if any, still remains to be found.

Mr. McKellar. Mr. President, will the Senator yield?

Mr. Overton. I yield.

Mr. McKellar. Does the Senator say that this provision would not change the law at all?

Mr. Overton. Yes.

Mr. McKellar. I think the Senator is entirely mistaken, because undoubtedly at the present time there is no provision of law for the renegotiation of a contract or the price contained in a contract. This language does provide for legal renegotiation of a contract. That is the main feature of the amendment.

Mr. Overton. Mr. President, it is not necessary for the Congress to vest authority in the Secretary of War, the Secretary of the Navy, or the Chairman of the Maritime Commission to undertake the renegotiation of a contract. They already have such authority.

Mr. McKellar. They say they have not.

Mr. Overton. They are doing it now.

Mr. McKellar. The evidence before the committee was that they have no legal authority for it. The Senator recalls the testimony of those gentlemen.

Mr. Overton. They have no mandatory authority. They have no directions from the Congress to do so; but they have the authority to renegotiate contracts.

Mr. Clark of Missouri. Mr. President, will the Senator yield?

Mr. Overton. I shall be glad to yield in a moment. Necessarily they have that authority. The Secretary of War can go to a contractor and say, "I think there are excess profits in this contract. I want to renegotiate it." Can he not do that?

Mr. McKellar. No.

Mr. Overton. Certainly he can. I differ with my colleague.

Mr. McKellar. The contractor can sue the Government to recover the contract price. If there were fraud in the contract the Secretary could defend on the ground of fraud. However, there is no present law—and I challenge the Senator to find any—which provides that the Government has the right to renegotiate the price fixed in a contract.

Mr. Overton. This amendment does not give such authority.

Mr. McKellar. Oh, yes; it does.

Mr. Clark of Missouri rose.

Mr. Overton. Mr. President, I have not had an opportunity to present my argument. . . . .

Mr. Overton. I was referring to subparagraph (b) of the proposed amendment. Subparagraph (c) undertakes to vest authority in the Secretary in the case of all contracts and subcontracts hereafter made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause, to renegotiate the contracts. So it undertakes

to give authority to the Secretary of the Department to require the contractor to renegotiate the contract price, and then to withhold from the contractor or subcontractor any amount of the contract price which is, as the Senate amendment had it, "deemed by the Secretary to represent excessive profits," but, as the substitute amendment has it, "which is found as a result of such renegotiation to represent excessive profits." Wherever in the substitute amendment there is any provision for renegotiation or for recovery or retention of excess profits by the Government, they must be such excess profits as are found to be excessive as a result of the renegotiation. Therefore the right of the Federal Government to withhold or recover excessive profits depends entirely on the act of the contractor in signing a renegotiated price contract. If the contractor says, "I refuse to sign the renegotiated contract," it makes no difference how much excess profits he is making; the Federal Government is without any authority whatsoever to modify the contract or to recover the excess profits, although they may amount to 100 per cent or 1,000 per cent, because they do not result from the renegotiation of the contract price. I think that the amendment inserted by the conferees destroys the effectiveness of the Senate amendment.

That view was taken in the House. The able Representative from Georgia (Mr. Vinson), who has made a considerable study of the question of excess profits, as the Senator from Massachusetts (Mr. Walsh) will no doubt agree, saw at once the ineffectiveness of the substitute amendment proposed by the conferees, and he made a statement to that effect. I should like to quote from it. The statement which he made to the House was not disputed by any Representative. It was not disputed by Mr. Cannon, in

(p. 3657)

charge of the conference report. This is what Mr. Vinson said:

> The conferees are bringing before the House a substitute which amends the Senate provision and leaves the question of excessive profits to be determined entirely by mutual agreement of the contractor and of the department concerned through renegotiation of the contract.

I repeat, "by mutual agreement." There must be a mutual agreement between the contractor and the department concerned. Continuing, Mr. Vinson said:

> This is no more nor no less than a restatement of existing departmental practice.

That is true. We know that for some little time the departments have been undertaking to renegotiate contracts, and in some instances have been successful; but the renegotiation of the contract depends entirely on the consent of the contractor to reduce the price. If the contractor will not, as a result of the renegotiation, enter into a contract reducing the price, then the renegotiation is at an end. The amendment now before the Senate contemplates that there shall be no finding of excess profits, and no recovery or retention thereof, unless they result by reason of a renegotiation of the contract price. That makes the whole effort on the part of the Congress to deal with this question in this manner absolutely futile.

Continuing to quote from Mr. Vinson:

> Each department head now has the right and considerable authority to require a renegotiation of any contract on which he believes the contractor is receiving excessive profits.

Mr. Vinson further said:

> The provision recommended by the conferees is definitely not an answer to the problem of exorbitant

profits on war contracts. It may be of some help to the departments in their campaign for voluntary refunding of excess profits by the contractor, but it will go no further than that.

That caused Mr. Tarver to make this observation:

If the gentleman's statement is correct—and I may say I am in full accord with him—then why should the House go through the futile motion of adopting this amendment? Why not reject the whole thing rather than have the people of the country believe we are undertaking to legislate on this question, when we are, in fact, not accomplishing anything?

Mr. McKellar. Mr. President, will the Senator yield?

Mr. Overton. I shall be glad to yield in a moment.

I have no desire at all to defeat this amendment, but I do not wish the public to think that the Congress of the United States has dealt effectively with excess profits by the amendment.

Mr. McKellar. Mr. President, I was about to say that, while it is true that that was Mr. Vinson's language on the floor of the House, yet the House, with practical unanimity, disagreed with Mr. Vinson and passed the bill.

Mr. Overton. I do not know that the House disagreed with Mr. Vinson.

Mr. McKellar. The House passed the bill.

Mr. Overton. I think the Senate will, with practical unanimity, and probably unanimously, vote for this conference report, and so will I; but I will do so not because we have met this problem face to face, or because we have done anything toward solving it. I will vote for the conference report because, first, it will not do any harm, while it will not do any good; and, second, because we have a $19,000,000,000 appropriation tied up with this attempt at legislation on the part of the Appropriations

Committee. So I am not opposing the conference report, and I am not going to oppose the particular substitute amendment we are now discussing.

* * *

Mr. Hayden. Mr. President, will the Senator yield at that point?

Mr. Overton. I yield.

Mr. Hayden. I entirely agree with the Senator that, from the legal standpoint, no contract can be renegotiated except as the result of an agreement between the contractor and the Government. However, will not the Senator concede that there is a positive advantage in affirmatively saying, as we do say in this measure, that any contract written in the future shall contain a provision that it is subject to renegotiation? There is no such law now. That is an advantage. If the measure becomes law, in the future a contractor who makes an original contract will know that if his profits are excessive he will be called upon to renegotiate the contract.

Mr. Overton. That is true; it has a persuasive effect.

Mr. Hayden. I understand that. The second point is that, following enactment of the measure, renegotiation will be by law directed, which again appears to me to be a positive advantage, instead of having no law at all.

Mr. Overton. Yes.

Mr. Hayden. The measure does not take away any of the extra-legal powers which the Departments have had heretofore.

What were the powers which the Departments had to compel the renegotiation of contracts? First, they could say to the contractor—as was done during the last World War by the head of the War Industries Board, Mr. Baruch: "You are making too much money." the contractor would say, "What are you going to do about it?"

It would be pointed out to him that he was engaged in other business, and that he would have great difficulty in obtaining priorities for materials needed in his other business unless he did right by the Government in this instance. That power still exists, and is very persuasive.

Mr. Overton. Certainly; they have that power, and they are exercising it now in the War Department.

Mr. Hayden. Yes; but I say it is better to write it into the law, instead of doing things in an extra-legal way.

A second point is that the Government may owe a contractor money, but it may take its time about paying the money. That is a second persuasive influence upon him.

Another point is that a contractor may have one contract but he may have difficulty in obtaining another one. That is another extra-legal influence.

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(p. 3657)

Those are extra-legal powers which the departments may exercise. Such powers would be in no manner changed by the pending measure; but we affirmatively say to the contractor in the original instance, "We are making this contract with you with the understanding that if your profits are unreasonable you will agree that there may be a renegotiation." On the other hand, the officials of the department who made the contracts are directed; and I think that is a positive advantage.

I think the Senator goes too far when he says we have done nothing; that it is just as though our action were a waste of time and effort. That is not true.

Mr. Overton. I think the argument of the able Senator supports my view, because he goes outside of the amendment in order to show what the secretaries of the different departments may do. They may say to a contractor, "You

are going to be badly treated on priorities." They may say, "We do not expect to give you any other contracts." None of that is in this amendment.

Mr. Hayden. I understand; but the Senator goes so far that I am afraid he will convey to the country the impression that really nothing is done. If the Senator is consistent, he should not vote for the adoption of the conference report.

Mr. Overton. Why not?

Mr. Hayden. Because he says we are doing nothing. Why do a foolish thing?

Mr. Overton. We are doing something. We are appropriating $19,000,000,000.

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(p. 3660)

Mr. Taft. • • •

It seems to me that the provision designated as section 403 (a) in the conference report is subject to every objection that has been applicable to any of the other provisions, plus the fact that it is completely ambiguous. Here is a provision dealing with literally billions of dollars, which is to be operative for years to come, and we cannot on the floor of the Senate agree what it means. If the courts are to decide the question, they will take years to determine what it means. It relates to the most essential feature of the business system, and to more than half of all the business in the United States.

Whether the provisions means granting to the Secretaries arbitrary power, or whether it means nothing, is a subject upon which members of the committee themselves cannot agree. The Senator from Louisiana (Mr. Overton) feels that it means nothing, and that nothing can be done unless a contract is renegotiated and a new agreement

reached with the consent of the contractor. If that be the fact, the whole contract does not mean anything.

I do not agree with the Senator from Louisiana. I agree that the provision is ambiguous. I agree that there are all sorts of possible interpretations. I agree that the question may be litigated for years to come; but it seems to me it is a rather complete delegation of the power, which Congress ought to exercise, over practically the entire business of the United States.

As I read the provision, it provides for renegotiation. Every contract may be reopened on notice from the Secretary. A man who had a contract would no longer have a contract. He must renegotiate. Perhaps he has spent millions of dollars. He would be tied up. He could not stop. He would have to reach an agreement if he expected to obtain any money at all from the United States Government. He would have no contract. If this provision should be enacted no company or individual in the United States could ever have a contract with the United States Government. We should be abandoning the theory of contracts. Any contract might be voided by the Secretary tomorrow, at his discretion. I think that is clear.

Obviously the contractor would be at a disadvantage. The Government would not have to agree to any price. The Government could take over his plant if it did not like what he was doing. I think it is pretty clear that even if there were no other provisions, all contracting with the United States Government would come to an end with this provision. Renegotiation is defined as including the refixing by the Secretary of the department of the contract price. So I believe that even under the direct terms of the bill the Secretary would have authority to change any price to any figure he might deem proper.

My principal objection to the provision is that not only would it delegate completely to individuals—the Secretary of War, the Secretary of the Navy, and the Chairman of the Maritime Commission—in their individual discretion, the question of what price shall be paid on any contract, whether they have agreed to any other price or not, but also for 3 years after the war—probably for 8 years from this time—without previous notice to any contractor, the Secretary might suddenly walk into the office of any business concern in the United States and say, "I think you made an excessive profit on this contract back in 1941 and 1942, and you will have to repay to the Government millions of dollars."

As I read the bill it gives powe to the Secretary of War, the Secretary of the Navy, or the Chairman of the Maritime Commission, whoever he may be at that time, to bankrupt every concern in the United States which has had any war contracts. That would mean two-thirds of all the companies in the United States of any size whatever. There is no limitation, and no standard whatever is prescribed by which the judgment of the Secretary may be controlled.

(p. 3661)

It is said that the contractor may go into court. Some Secretary of War appointed 5 years from now may decide that 6 per cent was too much; that after all, in a war contract, in view of all the sacrifices, 1 per cent was sufficient. He may demand that everything over 1 per cent be returned. I see no provision here which would enable any court to say that the Secretary was not correct in such an interpretation. There is not the faintest suggestion of a yardstick for excessive profits.

It is said that the procurement officers of the Army and Navy have approved this provision. I understand

why they have approved it. They have approved it because it is a complete delegation of power to them to decide what ought to be done with every contract, and on what basis they shall proceed. It may not be a uniform basis. A new Secretary of War may say, 2 or 3 years from now, "I think 2 per cent is reasonable. The Chairman of the Maritime Commission may adopt an entirely different basis, or he may adopt no basis at all. He may say that 1 per cent is reasonable on a certain contract, and 5 per cent on another contract.

That seems to me to be a perfectly unjustifiable and dangerous delegation of authority by the Congress to individuals, and one which, in my opinion, would entirely remove the incentive motive. Perhaps it ought to be removed; but I do not think that is the present intention or policy of Congress. We all want to prevent unreasonable profits; but it seems to me that with respect to labor, the farmer, and the businessman, there is still the belief that there is a purposed to be accomplished by keeping some incentive to individuals to proceed in behalf of the war effort.

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(p. 3661)

Mr. La Follette. I think my colleagues know that this is a subject in which I have been greatly interested. I hope I may be pardoned if I find myself very much confused about this particular draft, when two such able lawyers as the senior Senator from Louisiana and the senior Senator from Ohio disagree so violently about this particular provision. I think it helps to emphasize the Senator's point that this kind of legislation should never be attempted on an appropriation bill, especially an appropriation bill which is so urgent as is this one."

EXCERPTS FROM "RENEGOTIATION OF CONTRACTS" HEARINGS BEFORE A SUBCOMMITTEE OF THE COMMITTEE ON FINANCE, UNITED STATES SENATE 77th CONGRESS, SECOND SESSION ON SECTION 403 OF PUBLIC LAW NUMBERED 528, ETC.

September 29, 1942.

Statement of Hon. Robert C. Patterson, Under Secretary of War.

(p. 3)

Mr. Patterson. Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, providing for the renegotiation of contracts and subcontracts became effective on April 28, 1942.

Section 403 originated in the adoption on the floor of the House of Representatives of the Case amendment to H. R. 6868 (Sixth Supplemental National Defense Appropriation Act, 1942) the purpose of which was to limit the profits on any war contract to 6 percent. For reasons which were fully stated to the Senate Subcommittee on Appropriations, the War Department suggested the elimination of this provision. At the request of the chairman of that subcommittee, Mr. Donald Nelson and representatives of the War and Navy Departments agreed to suggest a substitute method of preventing excessive profits on war contracts.

The suggested substitute which was presented by General Somervell was based on the theory that if every contract price could be reexamined by the parties in the light of actual experience under the contract, it should be possible to eliminate the bulk of excessive profits. No

other compulsion upon the contractor was contemplated than:

(1) To furnish adequate data as to actual and legitimate costs; and

(2) *In the light of such data to bargain in good faith, for the purpose of readjusting the contract price.* It was thought that existing contracts could properly be subjected to such reexamination and the proposal submitted to the subcommittee accordingly so provided. This proposal in effect would have given statutory sanction and implementation to voluntary readjustment of contract prices which was being widely practiced by the armed services prior to the adoption of the Case amendment.

Senator Walsh. The Case amendment was adopted by the House and when the bill came to the Senate, the Case amendment was in it and this section that you are discussing was substituted for the Case amendment in the Senate.

Mr. Patterson. That is exactly right; yes.

Senator Walsh. Senate Appropriations Committee.

Mr. Patterson. Yes.

The statute as finally enacted differed radically from the proposal submitted by General Somervell. In substance, it imposed upon each of the services the duty of eliminating excessive profits by a process of renegotiation. Every contract and every subcontract made by every prime contractor is required to contain a provision for such renegotiation

(p. 4)

without regard to whether in the judgment of the Secretary such a provision was necessary or appropriate.

In other words, it was sweeping.

The term "renegotiation" was so defined *as, in the opinion of many lawyers,* to authorize the Secretary *to refix a contract price regardless of agreement with the contractor or subcontractor. In the light of the legislative history of the act, there may be serious doubt as to whether it was the actual intention of Congress to confer any such power of unilateral redetermination of the contract price, but the words clearly permit of such construction and it has been widely adopted by the business community.*

Finally, the statute seems clearly to contemplate something more than the reduction of contract prices found to be excessive; in cases where excessive profits have already been paid to contractors, a clear duty seems to be imposed upon the Secretary to recapture such profits by various devices suggested in the statute. Thus the statute seems to impose upon the Secretary the duty of recovering excessive profits as well as the duty of reducing unreasonable prices.

(p. 13)

Senator McKellar. Have you an amendment on that point?

Mr. Patterson. Yes, sir. I will come to that.

Senator Vandenberg. May I ask one thing further, Judge?

The complaint was made in the full committee the other day that "renegotiation" is a misnomer in connection with this process because renegotiation infers freedom of action on the part of both parties to the undertaking. What show does a contractor have when he enters renegotiations and when you announce what you think ought to be the renegotiation base?

What would happen if he said "No"?

Mr. Patterson. That is a matter on which the original statute is in some ambiguity.

"Renegotiation" in and of itself imvlies an agreement, mutual agreement.

Now, the provision about recapture that is in 403 may have another significance. You can argue that it means "move in." *I myself believe that renegotiation is mutual.* Of course, we have various weapons we can use. We can, I suppose, cancel the contract and place a compulsory order with the producer at what we call a reasonable price. We can, I suppose, report the case to the people up here as a case to be taken up. We can do that, but I don't think that that is desirable. Or we could withhold future business, on renewal of a contract, from a contractor who had not been what we thought was reasonable on renegotiation.

Senator Vandenberg. I think you have ample weapons to proceed, as I have indicated. I am just wondering, just in cold reality, whether the contractor isn't totally at the mercy of your negotiator's judgment.

(p. 18).

Mr. Patterson. I come now to quite an important amendment, which relates to final agreements.

(4) Final agreements: When a contractor or subcontractor has renegotiated in good faith *and agreed to eliminate any excessive profits found as a result of such renegotiation,* he is clearly entitled to assurance that the matter will not be reopened at a later date. The statute does not provide expressly for any final clearance for liability for excessive profits. The War Department, however, gives clearance for the period covered by the renegotiation, either at the time of renegotiation or after the end of the period, and it is believed that this in the proper construction of the act.

This is obviously of the utmost importance to contractors and subcontractors, and the power to give clearance aids in reaching agreements with contractors. The amendments specifically authorize such final or other agreements for a past or future period. Thus by such an agreement, the secretary may fix firm prices for a reasonable time in the future when he thinks it proper. This matter is so fundamental that it should not be left to interpretation.

We find an attitude on the part of producers fearful of being called back again a year hence to renegotiate for the very period, and the very subjects that have already once been settled by renegotiation. We believe that we ought to give them the assurance that, when we once renegotiate, the matter is closed for that particular subject matter and that particular period.

(p. 29)

War Department Price Adjustment Board.

June 30, 1942.

Memorandum for Commanding General, Services of Supply, Commanding General, Materiel Command, Army Air Forces.

Subject: War Department Price Adjustment Board.

1. The Price Adjustment Board created by memorandum of April 25, 1942, is hereby redesignated as the War Department Price Adjustment Board. It will serve as the coordinating agency of the War Department to determine and eliminate by renegotiation excessive profits from War Department contracts, and subcontracts thereunder, subject to approval by the Under Secretary of War or his designated representative.

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(p.30)

9. All agreements reached as a result of such renegotiation shall be made expressly subject to approval by the Under Secretary of War, or his duly authorized representative, and shall be in such form and accompanied by such supporting reports and documents as he may prescribe from time to time.

10. The manner in which agreements shall be carried out, whether by a reduction of contract prices, refunds, or otherwise, shall be determined by the Under Secretary of War, or his designated representative. Agreement shall be reached with the Navy Department and the Maritime Commission as to any part of the agreement affecting contracts with them.

11. The Commanding General, Services of Supply, and Commanding General, Materiel Command, Army Air Forces, are authorized and directed to create, with the advice of the War Department Price Adjustment Board, Price Adjustment Sections to conduct renegotiations with such companies as may be assigned to them by the War Department Price Adjustment Board, subject to review by the Board and approval by the Under Secretary of War or his designated representative, except in cases where by general instructions or in the particular instance, the Under Secretary or such representative may authorize them to make final agreements.

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War Department.
Headquarters, Services of Supply,
Washington, D. C., July 3, 1942.

SPPDP 020 (7-3-42).

Memorandum for Directors and Chiefs of Staff Divisions, This Headquarters; Chiefs of Supply and Administrative Services, Services of Supply; and Commanding Generals, all Corps Areas

Subject: Price Adjustment Sections.

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(p. 31)

4. All agreements reached as a result of such renegotiation shall be made expressly subject to approval by the Under Secretary of War, or his duly authorized representative, and shall be in such form and accompanied by such supporting reports and documents as may be prescribed.

5. Agreements reached by the Price Adjustment Sections shall be transmitted to the chief of the appropriate Supply Service and, when approved by such chief, shall be transmitted to the War Department Price Adjustment Board for review by the Board and final approval by proper authority, except in cases where, by general instructions or in the particular instance, the chiefs of the Supply Services are authorized to make final agreements.

6. The manner in which agreements shall be carried out, whether by a reduction of contract prices, refunds or otherwise, shall be determined by the Chief, Purchases Branch, Procurement and Distribution Division, Services of Supply.

7. Nothing herein contained shall preclude contracting officers from—

a. Continuing to make adjustments of prices or fees in individual contracts containing an express provision

for redetermination of the price or fee on the basis of a specified formula or containing an express provision that the price or fee shall be subject to renegotiation, whether or not under Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942.

b. Continuing to reconsider individual contracts of any type with a view to adjustment of the contract prices by voluntary renegotiation or to accept voluntary reductions in such contract prices without auditing the accounts of the contractor or subcontractor if the amount is deemed reasonable.

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TI-1171 July 8, 1942.

CONTRACT PRICE RENEGOTIATION

Commanding General,
Materiel Center, Wright Field, Dayton, Ohio.

(p. 32)

c. All agreements reached as a result of such renegotiation shall be made expressly subject to approval by the Under Secretary of War, or his duly authorized representative, and shall be in such form and accompanied by such supporting reports and documents as may be prescribed.

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War Department,
Office of the Under Secretary,
Washington, D. C., August 8, 1942.

Memorandum for Mr. Maurice Karker, Chairman, War Department Price Adjustment Board

Subject: Policy.

1. The following policies will be followed in the operation of the War Department Price Adjustment Board:

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(p. 33)

e. The attitude of the Board should be firm but friendly and renegotiations should be conducted in a spirit of cooperation and to require a minimum of time and inconvenience on the part of executives. Requests for information or detail not absolutely essential to the negotiation must be avoided.

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h. In case a company appears to be uncooperative or is unable or refuses to accept a settlement which the Board considers reasonable, the matter should be referred to the undersigned, Special Representative of the Under Secretary of War, for proper action.

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WAR DEPARTMENT

Price Adjustment Board

Principles, Policy, and Procedure to be Followed in Renegotiation

• • •

(p. 37)

IV. Contracts and Subcontracts subject to Adjustment *as a Result of Renegotiation*

V. Renegotiation Procedure

The primary purpose of the renegotiation is to arrive at the prices which would have been agreed upon when the contracts were made if the facts and factors now known had been known at that time. Accordingly, *after an agreement has been reached with a contractor or subcontractor as to the aggregate amount of any excessive profits realized, or likely to be realized, from its prime contracts and subcontracts with other prime contractors, these excessive profits may be withheld or recovered* by the Secretary of War, the Secretary of the Navy, or the Chairman of the Maritime Commission in various ways.

• • •

The ultimate test is what would have been a fair profit before Federal and other income and excess-profits taxes. It is for Congress, through the Treasury, to determine how much of that profit should be taxed. Increases or proposed increases in tax rates, while a factor to be considered, should not affect the principles of renegotiation or change the basic consideration from what would be a fair profit before taxes to what would be a fair profit after taxes. To renegotiate on the basis of allowing a company a fair profit after taxes would be tantamount to returning to the company part of what Congress has decided should be its contribution to the war effort.

(p. 40)

VIII. Agreements

All agreements resulting from renegotiation should be in writing signed in behalf of the company by the owner, a partner, or an authorized officer and, in the case of a corporation, accompanied by an attested copy of the authorizing resolution of the Board of directors.

(1) Prohibited Provisions

• • •

(2) Interim Argreements

(p. 41)

(3) Final Agreements

• • •

(4) Illustrative Provisions

(p. 54)

Memorandum—Suggested Amendments to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942 (Renegotiation of Contracts)

1. Definitions

(*a*) "*Excessive profits.*"—Throughout the present statute the phrase "any amount of a contract price which is

found as a result of renegotiation to represent excessive profits" is constantly used. For convenience and brevity in revised form the term "excessive profits" has been substituted for this phrase, but subsection (a) (4) defines the term as having the same meaning as the phrase for which it is substituted.

(p. 80)

Profit Limitations on War Contracts as Proposed by Hon. Carl Vinson, Member of Congress

HOUSE OF REPRESENTATIVES,
COMMITTEE ON NAVAL AFFAIRS.
Washington D. C., September 22, 1942.

Hon. Walter F. George,
United States Senate, Washington, D. C.

Dear Senator: I have noted with considerable interest recent publicity concerning your proposal to repeal the contract renegotiation authority contained in Public, 528, Seventy-seventh Congress, and to substitute therefor a direct statutory limitation on profits.

It has long been my firm conviction that the only equitable and effective method of limiting profits on war contracts is by means of a direct statutory limitation. The House Naval Affairs Committee has devoted considerable thought to a bill containing such a provision which I introduced but which the committee, after extended hearings, failed to report because of other controversial matters contained in the same measure. I am sure that a bill dealing solely with the matter of a limitation on war profits would have been enthusiastically received by the House.

At the time Public, 528, was before the House I pointed out the injustice of conferring on the various department heads the arbitrary and unlimited authority to limit profits

on war contracts by renegotiation, and the uncertainty which would result from such a provision, and expressed the hope that such renegotiation authority would soon be superseded by legislation setting out statutory standards defining reasonable profits on war contracts.

It is my feeling that the renegotiation provisions of Public, 528, makes any contract with the War or Navy Department ineffectual and illusionary.

I am enclosing for your study a copy of H. R. 6790 (Committee Print No. 2), which embodies the result of the time and thought devoted to the problem by myself and by the House Naval Affairs Committee. I hope that it may be of some help to you in connection with your present proposal.

With kindest regards, I am

Yours very truly,

Carl Vinson, M. C.

(p. 92)

Mr. Eichholz. As we see it, Mr. Chairman, the problem that this committee is faced with is a broader problem than that of taxation and profit limitation.

I might illustrate by a very simple example. Suppose that two different contractors are making the same item for the Army or the Navy and it costs one contractor a thousand dollars to make that item and it costs the other contractor $800 and the first contractor makes a 4-percent profit, and the second contractor makes a 10-percent profit. Even though the second contractor is making a much larger profit, the net cost to the Government is much less in the case of the second contractor. In other words, profits are only one of the items of cost that go into paying for the munitions necessary to win the war.

EXCERPTS FROM

RENEGOTIATION OF WAR CONTRACTS HEARINGS BEFORE THE COMMITTEE ON WAYS AND MEANS HOUSE OF REPRESENTATIVES SEVENTY-EIGHT HOUSE OF REPRESENTATIVES SEVENTY-EIGHTH CONGRESS ON H. R. 2324, H.R. 2698 and H.R. 3015, etc. SEPTEMBER 9, 1943.

(pp.1-2)

Statement of Hon. Maurice Karker, Chairman of the War Department Price Adjustment Board and Director of the Renegotiating Division of the Army Service Forces

I would be glad to make an oral statement as briefly as you choose to have me and then, of course, be available for whatever questions members of the committee would like to ask.

I am chairman of the War Department Price Adjustment Board and have been since July 1942.

Renegotiation is a statutory requirement under section 403 of Public, 528, adopted on the initiative of the Congress largely taken by Mr. Case in the House and Senator McKellar in the Senate, with the cooperation of the Departments, and presumably as a result of the disclosure of industry practices and profits early in 1942, following the beginning of the war, and carrying on from experience in the defense program.

In my judgment as an individual, it is a dangerous and un-American statute, but we are in a dangerous and destructive war which justifies unusual precautions and conditions.

• • •

(p. 5)

It was unbelievable a year ago that it would be possible for the War Department to conclude more than 4,000 agreements under this statute without having had to resort even once to a unilateral determination. Every agreement so far reached under the statute by the War Department has been a bilateral agreement. And by that I do not mean to be unrealistic or to fail to note the fact that the powers of negotiation are on the side of the Government; that the power of the statute is with the Government negotiators; but I do mean to make the statement as a tribute to the farsightedness and patriotism and common sense of the men who have represented industry in their renegotiation.

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(p. 8)

Most of these major suggestions have been treated in previous statements which I have made to committees of the Congress, and I should like to refer to the statement before the subcommittee of the Committee on Appropriations of the House of Representatives on the Military Establishment appropriation bill for 1944, beginning on page 483 of the hearings for Tuesday, June 1, 1943; secondly, to the statement before the Committee on Naval Affairs, House of Representatives, in the investigation of the progress of the war effort, beginning on page 991 of the hearings, Wednesday, June 30, 1943.

Mr. Gearhart. Would it not be proper to incorporate the testimony to which Mr. Karker has made definite reference in the record? I suggest that we incorporate it at this point.

The Chairman. Without objection, it will be done.

(The above-mentioned statements are as follows:)

Statements of Maurice Karker, Chairman, Price Adjustment Board, War Department, and Col. A. J. Browning, General Staff Corps, Director, Purchase Division, Army Service Forces, Before the Committee on Appropriations of the House of Representatives on June 1, 1943.

* * *

(p. 17)

Percentage of Profit Allowed Contractors

Mr. Case. In the case you have cited did you leave this company you referred to with any profit?

Colonel Browning. We left them with 20 percent profit, which was one of the highest profits we have allowed.

Mr. Powers. Twenty percent gross?

Colonel Browning. Before taxes.

Mr. Powers. How much did you leave them net?

Colonel Browning. That is very difficult to determine up to now under the Revenue Act of 1942. Generally, the reason we allowed them some 20 percent profit was that the price we finally got was $250 as against the next lower price of $330 and the next price of $400. We have allowed the lowest cost company 20 percent profit, the next 13½ percent profit, and the next one 4 or 5 percent profit.

* * *

(p. 30)

Data on Profits of Certain Large Concerns Before and After Renegotiation.

Mr. Mahon. Of the 1,700 contracts which you have renegotiated, in what number of them have the profits before taxes been as much as a million dollars?

Mr. Karker. I do not know. We will have to get you that figure and put it in the record.

(The matter referred to is as follows:)

"Approximately 415. A detailed check of approved cases shows the following proportions having net income before taxes but after renegotiation of the amounts tabulated.

"Less than $100,000, 27.5 percent.

"Between $100,000 and $250,000, 20.3 percent.

"Between $250,000 and $500,000, 16.4 percent.

"Between $500,000 and $1,000,000, 10.8 percent.

"Over $1,000,000, 25.0 percent.

Mr. Mahon. Do any of them run as much as $50,000,000?

Mr. Karker. Before taxes or after?

Mr. Mahon. After.

Mr. Karker. Yes; one company now earns 88 or 89 million dollars before taxes and 28 to 30 million dollars after taxes, after our recovery of 76 million of excessive profits in 1942.

Mr. Mahon. Is that one of the larger concerns?

Mr. Karker. Yes.

Mr. Mahon. Will you put in the record, not the same, but some of the higher incomes, giving us some details?

Mr. Karker. Yes.

(The matter referred to is as follows:)

1942 data on 11 large companies before and after renegotiation

Company, percentage of sales renegotiable, amount of recovery	Over-all net sales	Over-all net profit before taxes		Over-all net profit after taxes	
		Amount	Margin on sales	Amount	Margin on sales
			Percent		*Percent*
A. 78 percent ($76,000,000):					
Before	$536,930,191	$164,082,820	30.5	$47,801,762	8.8
After	460,930,191	88,082,820	19.1	33,361,762	7.2
B. 79.9 percent ($65,400,000):					
Before	457,331,000	126,106,000	27.6	29,935,000	6.5
After	391,931,000	60,705,000	15.5	13,652,000	3.5
C. 97.3 percent ($9,300,000):					
Before	380,221,000	45,867,000	12.1	13,154,000	3.5
After	370,921,000	36,566,000	10.1	10,597,000	2.9
D. 16.5 percent ($21,900,000):					
Before	996,751,292	155,384,284	15.6	47,774,197	4.8
After	974,851,292	133,484,284	13.55	41,137,197	4.2
E. 27 percent ($14,050,000):					
Before	221,560,000	77,570,000	35.0	27,273,000	12.4
After	207,510,000	63,520,000	30.6	24,603,000	11.8
F. 46 percent ($9,300,000):					
Before	361,993,500	43,943,590	12.1	18,881,129	5.2
After	352,693,500	34,643,590	9.8	15,481,129	4.4
G. 79.4 percent ($48,632,000):					
Before	2,250,549,000	297,685,000	13.2	[1]165,754,000	7.4
After	2,201,887,000	249,023,000	11.3	156,508,000	7.1
H. 55.4 percent ($46,500,000):					
Before	491,160,000	101,010,000	20.5	23,200,637	4.7
After	444,660,000	54,510,000	12.2	14,365,637	3.2
I. 94 percent ($34,352,041):					
Before	269,267,401	63,372,003	23.5	14,471,850	5.4
After	234,950,360	29,019,962	12.4	7,944,962	3.4
J. 89 percent ($128,208,005):					
Before	671,361,996	187,976,430	28.0	45,353,634	6.7
After	543,193,991	59,768,425	11.0	20,994,113	3.9
K. 70.4 percent ($53,000,000):					
Before	540,274,551	124,916,140	23.2	32,384,351	6.0
After	487,274,551	71,916,140	14.7	22,314,351	4.6

[1]Estimated.

Procedure in Renegotiation of Contracts

Mr. Powers. Let me see if I understand this renegotiation procedure properly. When you start renegotiating with a corporation or an outfit and they refuse to renegotiate or to abide by your findings, then you submit that to the Secretary of War for his finding?

Mr. Karker. We will prepare a determination but we have never done that yet. We would prepare a determination which would list the various factors affecting that company, with its background and its record in 1942, with its tax and fiscal determination.

Mr. Powers. You submit that to the Secretary of War?

Mr. Karker. To the Under Secretary, by delegation from the Secretary, and he will consider, and if approved, sign that, and that becomes an order upon the contractor.

Mr. Powers. Suppose he does not abide by that?

Mr. Karker. Then we will sue.

Mr. Powers. He has the right to go into court?

Mr. Karker. Yes, sir.

Mr. Powers. And the court decision is final?

Mr. Karker. Yes, sir.

* * *

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Mr. Karker * * * There has been a suggestion that there be measurement of excessive profits by fixed formula. In our experience any formula for the measurement of the excessiveness of profits resulting from prices which were originally too high, is completely impracticable and impossible in justice and in equity. It has previously been found impossible by this committee in taxation, a field heretofore susceptible of quite definite measurement by formula, in the provisions made in the Revenue Act of 1942 for the relief of particular situations under the excess-profits tax. It is much more difficult to make provision by formula for a renegotiation, for a determination of a pricing level, although there is entire willingness to consider any specific formula proposed, and to contribute to the effort to develop it.

* * *

(p. 64)

It is significant, I think, that up to now, some 16 months after the passage of the statute, there has been no unilateral determination in the War Department. It would be a mistake, however, to assume that unilateral determina-

nations will not be necessary, because I am satisfied that they will be necessary. All men cannot be induced by any means of which I am aware to agree even to that which is in their interest. The money nerve is an exposed and sentitive one, and men react violently and vociferously when it is touched.

There is inability on the part of many to see any distinction between the right to profit from the use of private capital and the right to equal profit from the use of public capital. It is probable that the profit allowances before the repayment of excessiveness will grow less as time goes on, and as the risks of war production can be more accurately determined, and as they are reduced. But it is perfectly clear, I am advised, and I am personally convinced, that in the event of unilateral determination without the agreement of representatives of the contracting company, there is the right of appeal to the courts by any corporation, partnership, or individual who considers himself aggrieved or mistreated.

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(pp. 71-72)

Mr. Robertson. What are the present limitations upon an appeal from a departmental decision?

Mr. Karker. The statute is silent. I am advised by counsel that the right is inherent.

Mr. Robertson. But don't you have like most bureaus, the protection that your findings of fact are conclusive?

Mr. Karker. Major, I am not a lawyer. I think you will find counsel a better witness. Our counsel of the Board, Mr. MacIntosh, is present. If you do not object, I would like him to answer the question.

Mr. Robertson. I will be glad to hear Mr. MacIntosh.

Mr. MacIntosh. I think that to the extent that they

are supported by substantial evidence they would be accepted by a court on appeal; but that would not justify, of course, arbitrary findings not supported by adequate evidence.

Mr. Robertson. Is there anything in the statute itself on the subject?

Mr. MacIntosh. There is nothing in the statute whatever dealing with the subject of appeal or the effect of the findings or determinations of the boards.

Mr. Robertson. Then why would they not go into court on the same basis as any litigant, on the facts?

Mr. MacIntosh. I think they would; but the general principle is that the findings of an administrative body such as this are entitled to support unless there is no corroborative evidence.

Mr. Robertson. The reason I raised the question is that I was told some thought that the right to go into court was a nominal right; that contractors could not get anywhere against the Government in court, and that therefore they would try to settle with the Government.

Mr. MacIntosh. I think they would have a substantial burden to overcome in the event of an appeal.

* * *

Mr. Robertson. What is the difference that you would allow in those cases?

Mr. Karker. It is impossible to measure accurately the weighting giving to any one of the factors taken into account, because the number is multitudinous. They are all present in some cases, but the same ones are not present in any two cases. But there is, in justice or equity, a difference depending on the source of the capital, particularly when you relate the profit to the production with that capital and consider the source to which that

profit will be distributed in relation to public capital on the one hand or private capital on the other.

Mr. Robertson. I remember a case in which one manufacturer was allowed 22 per cent above cost, and a competitor in the same line of business was allowed 10 per cent above cost.

Mr. Karker. That may well be true.

Mr. Robertson. I was just wondering if that was the difference between private and public capital or whether it was the difference between the agencies in the War Department that handled the job.

Mr. Karker. It was not the difference, because I am afraid, in that instance—and I cannot identify exactly the two, but I think in that instance the public capital was the one which was allowed the 22 per cent and the private capital the lower figure. The difference in individual approach—the competence, the experience, the conclusions of the people who conducted the renegotiation—may have had some influence. But I think the major difference in those two cases was in the costs of production—the date and the speed with which the one firm started its competence as an armorer, the importance of its production to the arming of the country for war at the time of its maximum peril, when there was imperative need for .30 and .50 caliber machine guns.

* * *

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Mr. Disney. Now, in your comments on your regulations you state that Congress prepared the definition of excessive profits. I have not had a chance to see your regulations; but, believe it or not, the Congress defined "excess profits" as follows:

> The term "excessive profits" means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits.

Is there some excuse for that? Let us go into that a little. We are working a 20-hour day here, and you say you are working a 16-hour day.

Mr. Karker. I am sure that was recommended in perfect good faith by counsel at the time. I was not here, but I was told that it was so recommended to the Congress.

Mr. Disney. Anyhow, you have no means of determining what excessive profits are except the judgment of the man who is handling the job?

Mr. Karker. That is right, sir; and the basis of their character and background and experience and judgment.

Mr. Disney. Now, you, as head of this Board, I judge from your personality, are an important element in the determination of policies. Of course you advise with others, but the initiation of ideas and policies emanates from you personally?

Mr. Karker. I take the responsibility for them, and I have had a great deal to do with their formulation and statement.

Mr. Disney. And you have advocated what you believe to be correct policies?

Mr. Karker. That is right, sir.

Mr. Disney. Now, suppose you should retire. Some other personality would have to take your place. Suppose his ideas about policies should vary widely from yours; then this statute would operate according to his judgment, or even his whims or notions, possibly. Is not that the danger under this statute?

Mr. Karker. That is a danger, but I think it is not a very acute one, because the policies are pretty well established in use in the minds of the organization, in the consciousness of industry, and because the policies, and any change in them, must be personally approved by the Undersecretary of War.

Mr. Disney. Still that remains a personal judgment, not according to any statute or formula?

Mr. Karker. That is correct, sir.

Mr. Disney. And the citizen, either corporate or personal, has to do the best he can under those circumstances and take his chances?

Mr. Karker. Well, but he is a party to the renegotiation.

Mr. Disney. That is what I mean. I do not mean in an ex parte hearing.

Mr. Karker. No, sir.

Mr. Disney. Now, what remedy does he have if he feels he is aggrieved?

Mr. Karker. He should not agree.

Mr. Disney. But what remedy does he have if he feels that he is

(p. 109)

aggrieved?

Mr. Karker. If he feels he is aggrieved, he should not enter into a bilateral agreement.

Mr. Disney. But you do not understand me. Suppose he does enter into the bilateral agreement, and he feels that the decision is incorrect, and wants redress of that grievance. What right has he?

Mr. Karker. I do not know. Of course, so far as I know, he has none.

Mr. Disney. He has none?

Mr. Karker. But I would ask a counter question: Why should he execute an agreement with which he does not agree, in which he thinks he is aggrieved and has been mistreated? He need not do that.

Mr. Disney. I am asking questions now, Mr. Karker.

What I want to get at is, Does he have a right to appeal from a decision by the Board?

Mr. Karker. Oh, certainly.

Mr. Disney. To what court?

Mr. Karker. He appeals first to the Under Secretary of War. If the representative of a contracting company or an individual meets with one of the district boards and fails to agree with them, feels that their judgment is all wrong and that they are taking much too much away from him, he in turn goes to the chief of that service. If he continues to disagree, he may go to the War Department Board, and he is still under no compulsion to agree.

If he still feels that he is mistreated, and we cannot convince him otherwise, he is allowed a hearing by the Under Secretary of War, and if he still continues to feel that his interests are being mistreated, that his rights are not being properly recognized, he would then require —this has never happened, but this would be the procedure from there on—require the Under Secretary of War to issue a unilateral determination, from which an individual has the right of appeal to the courts, according to my advice.

Mr. Disney. What courts?

Mr. MacIntosh. The Court of Claims, sir.

Mr. Disney. If that is done, is there jurisdiction?

Mr. MacIntosh. I think that most counsel that I have discussed the matter with feel that there would be jurisdiction.

Mr. Disney. Now, if he does get into court, what does he have, if the findings of the Under Secretary are conclusive?

Mr. MacIntosh. There is nothing in the statute that

makes those findings conclusive. There would, of course, be a presumption in favor of administrative findings, as there is in connection with all administrative determinations.

Mr. Disney. Where is the law that covers that? Is there any presumption that the findings of any administrative board or body is conclusive?

Mr. MacIntosh. Perhaps we can put it this way: Under the statute the Secretary is directed to eliminate profits which he finds to be excessive, so that then there would be a burden of proof upon the person who attacked that finding of showing that it was an improper and unjustified finding.

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Statement of Kenneth H. Rockey, Chairman, Price Adjustment Board, Navy Department

Mr. Rockey. Thank you. This statement is an outline of the organization procedure, policies, and accomplishments of the Price Adjustment Board of the Navy Department in the renegotiation of war contracts.

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If an agreement is reached as to what the settlement should be, a contract is prepared and submitted for approval to the Under Secretary of the Navy, who is also sent a summary of the facts in the case. If a contractor should be dissatisfied with the suggested settlement of the Board, the facts are submitted to the Under Secretary of the Navy for such action as he may take.

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(p. 155)

Mr. Rockey. If a mutually satisfactory agreement as to a reasonable amount of profit to be made on that business is not arrived at between the contractor and the Price Adjustment Board, the matter is referred to the Under-Secretary of the Navy. The contractor has certain relief if he does not agree with the Board or with the final determination of the Under Secretary.

Mr. Knutson. Well, of course, where all the agreements were entered into amicably and without any duress whatever, that would be one thing. But where they are obliged to accept a settlement, that is another thing; because, after all, the Government can say whether it will have material in the future, and probably shut off their credit through the Federal Reserve; there are so many ways that the Government has of bringing pressure.

Mr. Rockey. I know of no cases where such pressure has been brought.

* * *

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946

No. 95

AIRCRAFT & DIESEL EQUIPMENT CORPORATION,
Appellant,

vs.

MAURICE HIRSCH, E. D. McDOUGAL, JOHN R. PAUL, *et al.*,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

REPLY BRIEF FOR AIRCRAFT & DIESEL EQUIPMENT CORPORATION, APPELLANT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946

No. 95

AIRCRAFT & DIESEL EQUIPMENT CORPORATION,
Appellant,

vs.

MAURICE HIRSCH, E. D. McDOUGAL, JOHN R. PAUL, *et al.*,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

REPLY BRIEF FOR AIRCRAFT & DIESEL EQUIPMENT CORPORATION, APPELLANT.

ARGUMENT.

In this action, appellant seeks a determination of the constitutionality of the Renegotiation Act *in toto*. If not determined to be invalid *in toto* appellant seeks a determination in respect of Sections 403 (c) (1) and 403 (e) (1) and (e) (2). These sections purport to allow the War Contracts Price Adjustment Board and The Tax Court (both administrative agencies) to assert, determine and collect a claim for money against an individual

without affording him access to the constitutional courts of the United States for the trial of that claim.

Appellees' assert (p. 16) that they have no desire to prevent a decision of this Court as to the constitutionality of the Renegotiation Act.

Since this Court alone can authoratatively determine the constitutionality of the Act, a decision by this Court on those questions would effectively answer all contentions in controversy. If the Act be valid, then appellant must submit to whatever action the War Contracts Price Adjustment Board takes, regardless of its affect upon appellant.

If, however, the present state of the record does not permit this Court to pass upon the constitutionality of the Renegotiation Act, then it is respectfully urged that this court should remand the case to the District Court with direction to enter an order restraining the withholding of appellant's money and collection from appellant's customers until The Tax Court shall have acted upon the petition before it. In this manner appellant will have an opportunity to have the constitutional questions decided by this Court. Such was the prayer in the complaint for alternative relief (Rec. 167).

Notwithstanding the professed desire for a decision as to the constitutionality of the acts, appellees urge that the decree of the District Court should be affirmed because, (a) appellant must exhaust its Tax Court remedy before resorting to the courts, (b) appellant has an adequate remedy at law, and (c) this is a suit against the United States to which the United States has not consented.

Appellees, in asserting these reasons for affirmance have given but little consideration to the statute involved. They have made somewhat general statements as to prematurity of action, exhaustion of administrative remedies, and the

adequacy of legal remedies. But they have ignored those cases cited by appellant which have declared unconstitutional statutes such as the one involved here. This statute authorizes an administrative agency to issue and enforce its command prior to the completion of the administrative procedure by which such command may be modified or annulled. Such a statute violates the Fifth Amendment.

Before considering the cases relied upon by appellees as a basis for affirmance, it is proper to again review briefly (1) the pertinent provisions of the statute here involved, the Renegotiation Act, not statutes generally, and (2) some pertinent facts in this case relative to renegotiation, not different facts in other proceedings.

THE STATUTE.

(1) The Renegotiation Act was enacted February 25, 1944, almost three months after appellant's fiscal year, to which it is alleged to be applicable, had ended.

(2) Section 403 (a) (4) (A) (Appellees' App. p. 19) contains the so-called definition of "excessive profits" and the factors named which the Board is directed to take into consideration, although not excluding others, which appellees assert is "elaborate and detailed." (Appellees' Brief, p. 3)

(3) The Act becomes effective as to a particular contractor whenever in the opinion of the Board the amounts received or accrued under contracts with the Departments may reflect excessive profits. (Section 403 (c) (1), Appellees' App. p. 27)

(4) After a conference, if no agreement is made with respect to the elimination of excessive profits, the Board may issue an order determining the amount and give

notice thereof to the contractor. Section 403 (c) (1). (Appellees' App., p. 28)

(5) If no petition for determination be filed in The Tax Court within the time allowed by Section (e) (1), such order of the Board "shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency." Section 403 (c) (1). (Appellees' App., p. 28)

(6) Upon the filing of a petition in The Tax Court, "such court (The Tax Court) shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency." Section 403 (e) (1). (Appellees' App., p. 37)

(7) The filing of a petition under Section (e) (1) "shall not operate to stay the execution of the order of the Board under subsection (c) (2). Section 403 (e) (1). (Appellees' App., p. 38)

(8) Section (c) (2) (Appellees' App., p. 29) provides for the method of eliminating excessive profits. (Appellees' App., pp. 29, 30)

(9) Section 403 (i) (1) (Appellees' App., p. 41) describes the mandatory exempt contracts and Section 403 (i) (4) (Appellees' App., p. 44) the discretionary exempt contracts.

But no provision of this statute provides for refunds, either principal or interest, if the War Contracts Price Adjustment Board or The Tax Court should be in error either as to the validity of the law or the amount of excessive pofits. Nor is there any provision for a judicial determination or review of the acts of the Administrative agency.

PERTINENT FACTS.

(1) Appellant's petition for redetermination for the fiscal year 1942 was filed in The Tax Court on May 18, 1944, and is still pending before The Tax Court, but on July 19, 1944, while the petition was pending, $204,000 of funds due appellant from its customers was paid into the Treasury of the United States upon the orders of the Secretary of War because he had expressed an opinion that excessive profits had been realized and had made a unilateral determination of excessive profits upon data received from the contractor and from governmental and other reliable sources, all unknown to appellant except the data which it submitted.

(2) Appellant's petition for redetermination for the fiscal year 1943 was filed in The Tax Court on July 2, 1945, and is still pending, but, except for this proceeding and bond of $100,000 pending this appeal, directions would have been given to appellant's customers to pay an additional $270,000 into the Treasury of the United States, solely because the War Contracts Price Adjustment Board expressed an opinion that excessive profits had been realized and had made an order to that effect, upon data received from the contractor and governmental and other reliable sources, all unknown to appellant except the data which it submitted.

(3) Renegotiation demands are not taxes and the collection of taxes by the sovereign power has always been permitted upon a basis different than that permitted in the ordinary claim for money due.

Appellees' brief discloses their reliance upon three decisions of this Court as the fundamental supports for their argument, *Macauley* v. *Waterman S. S. Corp.*, 327 U.S. 540; *Coffman* v. *Breeze Corporations*, 323 U.S. 316,

and *United States* v. *Ruzicka*, 67 S. Ct. 207. Each of these decisions will be discussed so that there may be no doubt as to appellant's contention that not one is pertinent to the facts of this case.

The first case which they mention is *Macauley* v. *Waterman S. S. Corporation*, 327 U. S. 540. The fact is that the only similarity between that case and the present one is that each relates in some degree to the Renegotiation Act.

Waterman did not assert that the act was unconstitutional in whole or in part. He sought only a determination that his contracts were outside the provisions of the act. Waterman refused to furnish the Maritime Commission Price Adjustment Board with any data, or to attend any conference with respect to renegotiation. Appellant, however furnished all data requested and attended all conferences. Waterman never filed a petition for redetermination in The Tax Court. In fact, no determination was ever made by the Maritime Price Adjustment Board or elsewhere. No attempt was made to effect collection from Waterman's customers. But in this case the War Contracts Price Adjustment Board did make a determination of excessive profits. Appellant filed its petition for redetermination in The Tax Court after that order had been made. Funds due appellant will be taken (as was done before) while the petition is pending before The Tax Court. The *Waterman* case, as the decision shows, related to the simple proposition that Waterman could not by-pass the Maritime Commission and have its case decided by the District Court on the single proposition that its contracts were not covered by the Act. That was all there was before this Court for determination. It cannot be said that the Waterman Steamship Corporation was subject to any immediate invasion of its property rights. All it had to do was to

submit its data to the Maritime Commission and for aught that appears in the record the Board might have agreed with all its contentions.

In the *Waterman* case the Court was not even required to consider the adequacy of the administrative remedy. It pointed out that the administrative process had scarcely begun. In the instant case, having done all that it could do, the appellant has exhausted its administrative remedy and has demonstrated that such remedy is entirely inadequate to prevent irreparable injury. Having exhausted its administrative remedy and having determined that remedy to be inadequate, appellant turns to the courts of the United States for relief. The situation is the same as that before the court in *Porter* v. *Investors Syndicate*, 286 U. S. 461, and cases cited therein, which appellees ignore.

Appellant in the instant case is not attempting to by-pass any agency. That is apparent from the filing of its petition in The Tax Court. Appellant's experience has shown, and appellees admit that the remedy afforded will be wholly inadequate to protect appellant from the exaction of $270,000. Waterman, attempting to by-pass the agency, without the then possibility of loss, had no such situation to present as that presented here.

In the recent decisions of *United States* v. *Ruzicka*, 67 S. Ct. 207, 211, the Court said:

> "In construing the enforcement provisions of legislation like the Marketing Act, it is important to remember that courts and administrative agencies are collaborative 'instrumentalities of justice', and not business rivals. See *United States* v. *Morgan*, 307 U. S. 183, 191, *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 141 et seq."

This situation calls for action by the courts as one of the instrumentalities of justice.

In support of their contention that appellant has an adequate remedy at law, by suit against its several customers, appellees rely almost entirely upon the case of *Coffman* v. *Breeze Corporations*, 323 U.S. 316. The decision in that case is directed to the question as to whether the complaint was rightly dismissed for want of equity jurisdiction and for want of a justiciable case or controversy.

Again, appellees have relied upon a decision without any consideration of the nature of the statute or the applicable facts. Had appellant here sued one of its customers without asking for any sum alleged to be due and had it asserted the invalidity of the Renegotiation Act in that suit and had the customer answered that it owed nothing to appellant regardless of the validity or invalidity of the Renegotiation Act, there would have been some comparable facts. In the *Coffman* case, this Court said (p. 321):

> "The answer of appellee Breeze in the present suit denies that it owes any royalties to appellant. It alleges that whether the Royalty Adjustment Act is valid or invalid is a matter which is immaterial to appellee for the reason that it owes appellant no money as royalties or otherwise. In the present suit appellant asks no judgment for the recovery of the royalties alleged to be due from Federal and appellee Breeze. It seeks only an adjudication that the Royalty Adjustment Act and the orders purporting to be made in conformity to it are unconstitutional as applied to appellant, and asks an injunction restraining Breeze and Federal from complying with the Act and the orders by paying any part of the royalties into the Treasury or to any person other than appellant."

It appears that if Breeze and Federal were not indebted to Coffman, and Coffman asked nothing of Breeze and

Federal, the validity of the Royalty Adjustment Act was immaterial. Here the indebtedness due appellant from its customers is admitted and the only basis for failure to pay appellant is the order of the Secretary made pursuant to an invalid statute.

Other facts distinguishing the *Coffman* case from the instant one are:

(1) The Royalty Adjustment Act, in terms, authorized the patent owner to sue in the Court of Claims, if he feels aggrieved by the determination of the agency. The Renegotiation Act not only fails to authorize such suit but in terms preclude such a suit. Sections (c) (2) and (e) (1) and (e) (2) provide that no court or other agency shall disturb the findings of the Board or the Secretary or the Tax Court.

(2) Federal Laboratories, Inc. was one of the defendants and was owned by Breeze Corporations, Inc. Coffman had previously sued Federal in the United States District Court for New Jersey, so there was no possibility of disturbance of customer relationship as in the present case.

(3) "Appellant does not in the present suit," said the Court in the *Coffman case*, 322 U.S. 316, 322, "bring to our attention any facts showing or tending to show that a suit to recover a money judgment for the royalties would not afford complete and adequate relief without resort to an equitable remedy." That is not true in this case. Here in addition to the fact that no form of judicial review is provided, it is alleged that if appellant were compelled to sue its customers it will destroy the relationship of business established by appellant. *American Federation of Labor* v. *Watson*, 327 U. S. 582; *Columbia System* v. *United States*, 316 U. S. 407. In the *Coffman* case, Coffman had already sued both of his customers. Further-

more they were his licensees, not customers as that word applies to purchasers from appellant.

(4) The complaint did not allege in the *Coffman* case that if the injunction did not issue the Breeze Corporations would pay the money into the Treasury. Exactly the reverse is true of this case.

(5) In *Coffman* v. *Breeze,* it was pointed out that the question of the constitutionality of the act was not raised in the suit pending in the United States District Court for New Jersey and that the appellant was merely seeking an advisory opinion in the equity action for use in the lawsuit in New Jersey. Here appellant seeks no advisory opinion for any subsequent lawsuit, and desires only to protect itself from illegal exactions.

(6) Finally, in *Coffman* v. *Breeze,* the action of the Secretary was not challenged as *an act of wrongdoing of the Secretary.* He was not a party to the action. The case of *Coffman* v. *Breeze* does not call into question whether the Secretary must answer for his own wrongdoing. It will not be denied that if the action of the Board in this case is wanting in constitutionality, its members and the Secretary of War or his delegate are engaged in tortious conduct. The principle that no one has the right to cause another to break his contract with a third party is as old as *Lumley* v. *Gye,* (1853) 2 El. & Bl. 216. It has been reiterated so frequently that no citation of authority is necessary. The notion that a wrongdoer may not be required to answer for his wrongdoing because one who he has injured may have a remedy against someone else has never been decided by our courts. Indeed, the short answer to that proposition is that this Court has decided that if one is:

" . . . sued for conduct harmful to plaintiff his only shield is a constitutional rule of law that exonerates him." *Brady* v. *Roosevelt S.S. Co.,* 317 U.S. 575, 584, quoting

from *Sloan Shipyards Corp.* v. *Emergency Fleet Corp.*, 258 U. S. 549, 567.

What we have said we think sufficiently disposes of the contentions made by appellees in respect of *Coffman* v. *Breeze*, on which they rely.

Appellees also contend that the recently decided case of *United States* v. *Ruzicka*, 67 S. Ct. 207, is authority for the proposition that the Secretary may direct customers of appellant to pay into the Treasury of the United States, the amount of "excessive profits" determined by the War Contracts Price Adjustment Board, prior to any hearing in The Tax Court. It is also contended that under that decision the equity courts of the United States do not possess the jurisdiction or the power to prevent such action.

Had appellees given more careful consideration to the Ruzicka decision, they would have ascertained that the case supports no such contention. In reaching the decision the Court said:

> "Certainly the recent growth of administrative law counsels against generalizations regarding what is compendiously called judicial review of administrative action. And so we deem it desirable, in a case like this, to hug the shore of the precise problem before us in relation to the provisions of the particular Act immediately relevant. One general observation, may, however, be permitted. Both courts and administrative bodies are law-enforcing agencies, utilized by Congress as such. In construing the enforcement provisions of legislation like the Marketing Act, it is important to remember that courts and administrative agencies are collaborative 'instrumentalities of justice', and not business rivals. See *United States* v. *Morgan*, 307 U. S. 183, 191; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 141 et seq. And so we are not called upon to decide what powers inhere in a court of equity, exercising due judicial discretion, even in a suit such

> as was here brought by the United States for the enforcement of an order under Sec. 8a. We say this because it appears that at a stage in the proceedings in the district court a motion for a stay, pending disposition of the petition by the Ruzickas before the Secretary of Agriculture, was made by the respondents. With the court's leave, this motion was subsequently withdrawn. The power of the district court to have acted on it is therefore not before us. *Compare Scripps Howard Radio* v. *Comm'n*, 316 U. S. 4; *Hecht Co.* v. *Bowles*, 321 U. S. 321."

If ever a court confined its decision to "precise problems" before it, in "relation to the provisions of the particular act", this Court did in the Ruzicka case. It therefore becomes of greater importance than ever to consider the particular act then before the Court so that there will be no unwarranted extension of that decision.

The act before the Court was Agricultural Marketing Act of 1937.

The question before the Court as stated by the Court at page 208, was:

> "Thus the question before us is whether a handler may resist a claim against him by the Secretary of Agriculture, made according to the procedure defined in the Act, without previously having sought to challenge the claim in a proceeding, also defined in the Act, before the Secretary of Agriculture."

Has there been even a suggestion that appellant here, has not previously challenged the claim asserted against it in the manner, in the time, and before the agency designated by the Act itself? Ruzicka could have filed a petition with the Secretary. This he failed or refused to do. Appellant here has filed its petition. In addition, either Ruzicka might have obtained in the District Court complete redress of any injury he might sustain if the order of the Secretary was erroneous.

Ruzicka, under the provisions of Section 8c (15) of that act, might have filed a bill in equity to review the ruling of the Secretary, and if it be determined that such ruling was not in accordance with law, the District Court would be compelled to remand such proceedings to the Secretary with directions either (1) to make such ruling as the District Court might determine to be in accordance with law, or (2) to take such further proceedings, as in its opinion, the law requires. Ruzicka could by the simple process of filing a petition in the District Court have secured a decision of a court on the merits of his claim. It is further provided in subsection 8c (15) that "any proceedings brought pursuant to Section 8a (6) (the enforcement proceedings) shall abate whenever a final decree had been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to subsection (15)." (The parenthesis and words within it have been added by us.)

No such rights are accorded by the Renegotiation Act. They are expressly denied. The Ruzicka case differs from this case in that Ruzicka had a right to not one, but two days in a constitutional court. Here the appellees are urging that appellant has no right to any day in a constitutional court.

There is another important difference between the Ruzicka case and this case.

Ruzicka was in the milk business which is governed by a comprehensive scheme of marketing provided by statute affecting producers, handlers, and the public. Any delay in meeting obligations imposed by statute would affect the entire industry indirectly and the producers directly. If all handlers did not contribute to the fund in the amounts required by the statute, no producer could obtain the amount of money to which he was

justly entitled. In its opinion the Court said: "Handlers are thus assured opportunity to establish claims of grievances while steps for the protection of the industry as a whole may go forward." There is nothing new in the doctrine that individual rights must in certain situations give way to the public good. This is the principal upon which buildings may be destroyed in a conflagration, trees may be destroyed to preserve the health of other trees, people may be vaccinated to preserve the health of society, prices may be stabilized to effectuate the general welfare.

But here no other individual could be affected by staying the mandate of the War Contracts Price Adjustment Board, until The Tax Court has acted, and an opportunity afforded for a determination of the validity of the law.

Finally, the Ruzicka case differs from this case in that although Ruzicka had applied to the court for a stay, pending disposition of his petition before the Secretary of Agriculture, his motion for a stay was later withdrawn. What we are asking here, in part, is that the order of the War Contracts Price Adjustment Board be stayed at least until The Tax Court shall have had adequate opportunity to make its redetermination. Appellees resist this proposal. They want no interference from any court. They apparently do not regard the courts and administrative agencies as "collaborative instrumentalities of justice." That doctrine announced in *United States* v. *Morgan*, 307 U. S. 183, 191; *Federal Communications Comm.* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 141 and in the Ruzicka case is not in harmony with their ideas of arbitrary power.

Appellees apparently wish to extend the doctrine of the Ruzicka case to make it possible to do that which was

done with the sanction of a court to situations where such power may be exerted without such sanction.

The foregoing discussion of the Macauley, Coffman and Ruzicka cases sufficiently demonstrate their inapplicability to the various propositions for which they have been cited by appellees under their discussion of their points 3, 4, 5, 6, and 7 (brief, pages 20 to 32).

Other propositions advanced in appellees' brief will now be discussed in order.

I.

EXHAUSTION OF ADMINISTRATIVE REMEDIES.

Appellees' position in this respect cannot be supported by any precedent in Anglo-American law. Appellees scarcely try, but, in generalities, endeavor to sustain this amazing attempt to justify their conduct by relying on the doctrine of "exhaustion of administrative remedies." Their position is that appellant cannot question their act now since appellant will, at some later date, be entitled to a hearing in The Tax Court, which does not have power to direct repayment. In fact, it has no power except to redetermine the amount of excessive profits.

Appellees have not only misconstrued the exhaustion doctrine, as announced by the decision of this Court, but they would have this Court validate arbitrary action.

The exhaustion doctrine is not without limits. In many factual situations where its applications would seem probable, it has been limited by this Court, when it would lead to an unconstitutional result. Such would occur here.

In *Pacific Tel. Co.* v. *Kuykendall*, 265 U. S. 196, the telephone company sought relief by injunction against an order of the Department of Public Works of the State of Washington prescribing maximum rates and charges on the

grounds that the commission's rates did not afford the company an adequate return. A state statute permitted an appeal to the state courts, but pending such appeal no stay of the commission's order was allowed. This court, in granting the injunction, observed, at page 201:

> "It is apparent from these provisions that, after the Commission finally denied the increase of rates applied for, the company had exhausted its administrative remedy to avoid the alleged confiscatory rates under which it was compelled to render the service. It had, therefore, no recourse but to a court. Both by reason of diverse citizenship and because of the federal constitutional question the federal court of equity was available to it. The state statute forbidding a stay of proceedings until a final judicial decree was rendered, of course, could not prevent a federal court of equity from affording such temporary relief by injunction as the principles of equity procedure required. The conditions set out in the bill, therefore, seem to have made a case ripe for federal relief. *Bacon* v. *Rutland R. R. Co.*, 232 U. S. 134; *Prendergast* v. *New York Tel. Co.*, 262 U. S. 43, 48.
>
> "But it is urged that such relief is premature because the rates, increase of which was refused, were reasonable, and afforded an adequate return on the value of the property of the company used in the public service as fixed by the Commission in accord with the statutory procedure for that purpose, and that the company still has a right to appeal from the valuation of the Commission to the Superior and Supreme Courts on the legislative question of that valuation."
>
> (p. 203.)
>
> "It is thus apparent that the contention of the Department and the state authorities that the company has not exhausted its remedy • • • is correct."
>
> (pp. 204-205.)
>
> "It has done all it can to get relief and cannot get it. • • • there was no chance for a stay. • • •

"Under such circumstances comity yields to constitutional right, and the fact that the procedure on appeal in the legislative fixing of rates has not been concluded will not prevent a federal court of equity from suspending the daily confiscation, if it finds the case to justify it. *Oklahoma Gas Co.* v. *Russell*, 261 U. S. 200, 293."

This case, holds that if petitioner is or will be irreparably injured pending the administrative process, equity will afford him an injunction regardless of the exhaustion doctrine.

Appellees avoid discussion of the facts of the present case. Those facts lead directly to *Pacific Tel. Co.* v. *Kuykendall*, 265 U. S. 196, and *Porter* v. *Investors Syndicate*, 286 U. S. 461. The Secretary of War is bound by the Constitution of the United States as was the State of Washington. When one is being irreparably injured and can obtain no relief in the administrative process, equity will protect his property pending the completion of the administrative act and a judicial determination as to the legality of the administrative authority, a determination which can only finally be made by this court.

In the case of *Myers* v. *Bethlehem Corp.*, 303 U. S. 41, discussed pp. 106-107 of our original brief, there was no danger that property would be taken, funds withdrawn, or working capital impaired. In fact, any order of the agency was without any legal significance to Bethlehem until it had been affirmed by the Circuit Court of Appeals. But in the instant case, appellees say there must be no court hearing.

Appellees attempt to buttress their position by resort to tax cases, although it is conceded that this case is not a tax case. They cite (brief, p. 24) *Phillips* v. *Commissioner*, 283 U. S. 589. There a deficiency assessment was made by

the Commissioner against a taxpayer. He appealed to the Board of Tax Appeals and from there to the Circuit Court of Appeals. This court granted certiorari. His specific objections were that he was required to file a bond and that the Board's determination of facts was to be treated as final. Although the decision is silent, it may be inferred that the tax in question was not paid prior to the decision of this Court. The court makes it clear there, as is provided by statute, that an appeal from an adverse ruling to the Board of Tax Appeals (now The Tax Court) stays the collection of the taxes, and, upon filing of a bond after the decision of The Tax Court, no collection can be made until review of that agency's determination is made by the Circuit Court of Appeals.

The *Phillips* case shows clearly how a taxpayer is protected. Though the collection of taxes is always more summary in character than any other proceedings, except perhaps custom duties, a taxpayer cannot be injured, except in cases of fraud or jeopardy, until the administrative process is complete. This is not true of the renegotiation acts.

(1) Under this subparagraph of their brief, appellees argue that even if there is no provision in the law for refunds, such is implicit in the law itself. Their authority is Congressman Disney's statement in the congressional debates (Appellee's brief, p. 19). If Mr. Disney's determination of that question of law is to be regarded as conclusive or even persuasive, it should not be doubted that the remainder of his utterances on questions of law should also be persuasive. He said also (89 Cong. Rec. 9930):

> "So I am convinced in my own mind, as I believe is every other lawyer in this House that the retroactive application of the renegotiation law is an act of repudiation and hence unconstitutional."

The fact is, the Renegotiation Act contains no provision for refunds. Nor does appellant now know whether an appropriation will be made in the event that the present one expires before it could be employed to give relief to appellant. The language in the appropriation act (p. 20 Appellees' brief) which refers to refunds limits them to such instances "as may be adjudged or determined to be owing in law or equity". We do not desire to attribute to Congress the making of a futile appropriation. But to avoid this, it may be concluded that Congress never intended that The Tax Court should have exclusive jurisdiction of any matter other than the amount of the determination of excessive profits, leaving to courts the determination of questions of law.

It is also clear that no refund may be made except on certification of the War Contracts Price Adjustment Board. This creates another hurdle before appellant can obtain its money even if the appropriation had not expired.

Thus the relief which appellees state is available to appellant is so uncertain as to constitute no real relief.

(2) The Renegotiation Act contains no provision for adequate interest. The Third Deficiency Appropriation Act provides for the payment of 4% per annum. The demand for payment is for the amount plus 6% per annum. The Third Deficiency Appropriation expires in 1947. Appellants' 1942 case is No. 9 of the Renegotiation cases, filed May 18, 1944. Appellants' 1943 case is No. 228R of Renegotiation cases, filed July 2, 1945. Both are still pending on the petition and the answer thereto.

(3), (4), (5), (6), (7). (Appellees' Brief, pp. 21-32.) Under these numbers appellees discuss generally the absence of judicial review, multiplicity, payment in advance of administrative remedy, initiation of proceedings in The Tax Court being inadequate to justify resort to a court of

equity, and the insufficiency of the allegation of unconstitutionality. The authority in each instance is one or more of three cases, *Coffman* v. *Breeze*, 323 U. S. 316; *Macauley* v. *Waterman Corp.*, 327 U. S. 540, and *United States* v. *Ruzicka*, 67 S. Ct. 207, previously analyzed. This analysis shows their inapplicability to the case at bar.

(8) Under this section appellees argue that the act is not unconstitutional in toto.

Appellees refer to a number of cases where the delegation was upheld as being sufficiently definite. With those cases and those standards appellants have no complaint. In each there was a degree of definiteness of standards lacking in the Renegotiation Act. The interesting part of appellees' position is the statement:

> "The cases on which appellant apparently relies (Br., pp. 43-51) are not concerned with delegation of legislative power but with the definiteness of statutory language, unimplemented by any administrative action, as a standard for unlawful conduct."

In *Schechter Corp.* v. *United States*, 295 U. S. 495, discussing delegated power, the Court said:

> "Those who act under those grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary."

Appellant does not contend that administrative agencies by implementing statutory language have no place in administrative law. But the cases cited by appellant in its original brief are not all wanting in administrative implementation. It was not so in *Standard Chemical & M. Corp.* v. *Waugh Chemical Corp.*, 231 N. Y. 51, 131 N. E. 566. Nor was this true in *Small Co.* v. *Am. Sugar Ref. Co.*, 167 U. S. 233. On the contrary, there had been administrative implementation in each of these cases.

In the *Waugh* case the President of the United States had fixed the price of oleum. In the *Small Co.* case the President had fixed one cent per pound as prima facie reasonable profit on sugar.

The crucial point is whether the Congress has created a framework within which the agency may effectuate the purpose or policy of an act of Congress. In *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 216, the Court said:

> The Commission was, however, not left at large in performing this duty. The touchstone provided by Congress was the 'public interest, convenience, or necessity,' a criterion which 'is as concrete as the complicated factors for judgment in such a field of delegated authority permit.' *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.,* 309 U. S. 134, 138. 'This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power.' Compare *New York Central Securities Co.* v. *United States,* 287 U. S. 12, 24. The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character and quality of services . . .' *Federal Radio Comm'n* v. *Nelson Bros. Co.,* 289 U. S. 266, 285."

This Court has frequently used the word "canalization", to describe the necessary specificity. It has also repeatedly said that the Congress must give sufficient specificity in its exactments, so that "Congress, the courts and the public" may be able to ascertain whether the agency had kept within the Congressional mandate.

When Congress hands its power to an administrative agency, knowing that the administration of the Act is left to the "judgment of the man handling the job," there is no framework, no canalization, no limits by which Congress, the courts and the public can know whether it has kept

within the mandate. The congressional history of the Renegotiation Act shows that just that was done in this case. The doctrine of implementation cannot be applied unless there is something to implement.

The case of *Waite* v. *Macy*, 246 U. S. 606, brings the problem into relief. There Congress outlined the policy to exclude poisonuous or impre tea. The administrative agency implemented the policy with pots of standard teas. The agency excluded a certain tea for failing to meet the requirements, as it contended, of the teas in the standard pots. The Court held that the agency had not kept within the Congressional mandate in excluding the tea in question. It would be impossible here to make a determination as to whether the agency had kept within the Congressional mandate, as was possible in *Waite* v. *Macy* under these acts. That is one reason they are unconstitutional.

On the subject of retroactivity appellees say (Brief p. 34):

> "Even more clearly, appellant's contentions as to the unconstitutionality of the statute when retroactively applied would not make the law entirely void: there would be ample room for prospective operation."

If the retroactive features of the Renegotiation Act be declared unconstitutional, there is no need to consider whether the prospective feature would be unconstitutional and this Court would not in this case consider that interesting but then immaterial question. We have here a statute which was passed February 25, 1944, pursuant to which appellant was "renegotiated" for its fiscal year ended November 30, 1943. If the act is void because of retroactive features which, in terms, authorize the "renegotiation" of any subcontractor, whose fiscal year ends subsequent to June 30, 1943, there certainly is no need to con-

sider in this case whether the prospective features of the act are constitutional.

However, it is not unreasonable to suppose that if the retroactive features of the Act are in themselves unconstitutional they render the entire Act unconstitutional. This is so because the very sections of the Act are so intermingled one can not stand and the other fall.

In *Carter* v. *Carter Coal Co.*, 298 U. S. 238, the Court said:

> "These two sets of requirements are not like a collection of bricks, some of which may be taken away without disturbing the others, but rather like the interwoven threads constituting the warp and woof of a fabric, one set of which cannot be removed without fatal consequences to the whole."

Appellees contend that since appellant has the right to a hearing in the Tax Court and from there has an appeal to the Circuit Court of Appeals together with a further right to petition this Court for a final review, the remedies available to it preclude the issuance of an injunction by the District Court.

This contention is untenable. If, as was said in the case of *Addison* v. *Holly Hill Co.*, 322, U. S. 607, at page 616:

> "The determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested"

it may be said with greater force that the constitutionality of an act cannot be left to the decision of those designated to exercise the power granted by the act itself.

The doctrine of exhaustion of administrative remedies is only an expression of the ancient principle of equity that no one may invoke its powers until he has been injured or until injury is impending. When such injury is clear, then the argument that further administrative proceedings

are available is no answer if that procedure does not and cannot prevent the damage. This is the teaching of the *Kuykendall* case and *Porter* v. *Investors Syndicate,* 286 U. S. 581.

So appellant concludes that inasmuch as it is about to be injured and the only excuse given by appellees for that injury is an Act of Congress, appellant must surely have a right to a determination by a court of the constitutionality of the act before the injury is inflicted. This leads to one of two results, either the District Court should have passed upon the constitutionality of the act, *Pennsylvania* v. *West Virginia,* 262 U. S. 553; *Carter* v. *Carter Coal Co.,* 298 U. S. 238; *Euclid* v. *Ambler Co.,* 272 U.S. 365; *Pierce* v. *Society of Sisters,* 268 U. S. 510; *St. Louis & R. Co.* v. *Public Comm'n,* 279 U. S. 560; *Natural Gas Pipeline Co.* v. *Slattery,* 302 U. S. 300, or at least it should have stayed the hand of the War Contracts Price Adjustment Board in its efforts to collect appellant's funds until The Tax Court reached a decision on the petition now pending before it.

II.

ADEQUACY OF REMEDY AT LAW.

Under this point appellees assert that appellant has an adequate remedy at law and advance the *Waterman* and *Coffman* cases as their authority.

The availability at law of a plain, adequate and complete remedy is conceded fatal to the right of injunctive relief. But is the right of appellant to sue its customers a plain, adequate and complete remedy?

The answer is No. Why should appellant be required to sue its customers to determine whether the War Contracts Price Adjustment Board or the Secretary of War acted

in a legal manner? (See pages 10-11 hereof.) Assume that such suits were instituted in the several jurisdictions as required. In those proceedings what issue or issues are presented? Appellees concede that the constitutionality of the statute could be determined in that suit. But that is not the only issue. In such a suit appellant would have but a half day in court, since he must accept for the purpose of that suit the determination of the War Contracts Price Adjustment Board. But the determination of the Board is not final. The amount, at least, can be finally fixed only by The Tax Court, and The Tax Court has not acted.

If, in those suits, the act be determined to be constitutional, then the payments have been irrevocably made. Subsequently The Tax Court might well decide that there were no excessive profits or only a fraction of the amount determined by the Board. Does appellant then have an immediate right to repayment? The Third Deficiency Appropriation Act does not so provide. There may not even be an appropriation when The Tax Court acts. But one thing is certain: the Renegotiation Act is silent as to repayment. Does appellant then have the right to sue again the customer for an additional sum or would the prior judgment operate as an effective bar to such second suit?

Furthermore, all the appropriation acts appropriating money to make renegotiation refunds limit the use of such appropriations "as may be adjudged or determined to be owing in law or equity." In using these words "in law or equity," the Congress may have implied the right to court action since the determination of an administrative body could scarcely be said to be "in law or equity." Again, the Congress may have meant, in making these appropriations, to refer only to such refunds as may become due by reason of suits instituted by subcontractors

against contractors, or refunds found to be due by reason of a court decision in suits instituted by the Government in constitutional courts authorized under Section (c) (2) of the Act.

The fallacy in the whole argument regarding suits against customers is that such suits will be maintained or defended upon a theory that the amount sought is fixed and definite, and yet throughout their brief, appellees assert that The Tax Court has exclusive and final jurisdiction to determine the amount. All the while The Tax Court has not yet made its determination of that amount.

Appellees rely upon *Spaulding* v. *Douglas Aircraft Co.*, 154 F. (2d) 419, as authority for the proposition that the right to sue customers is fatal to the procedure adopted here. But Spaulding obviously had no other course to pursue. In that opinion it is said at page 426:

> "Though appellants, whose excessive profits had been determined by the Secretary on February 2, 1944, had ninety days from February 25, 1944, to seek such redetermination, they did not do so but instead, on August 11, 1944, filed the instant suit in the District Court. They are thereby in a position analogous to that of a taxpayer who has failed to initiate his proceeding for redetermination of a tax deficiency within ninety days after he has received the Commissioner's deficiency letter. As stated by the Supreme Court in *Utley* v. *St. Petersburg*, 292 U. S. 106, 109, 54 S. Ct. 593, 595, 78 L. Ed. 1155:
>
> 'This court will not listen to an objection that the charge has been laid in an arbitrary manner when an administrative remedy for the correction of defects or inequalities has been given by the statute and ignored by the objector.' "

Spaulding having failed to file a petition in The Tax Court within the time provided, the determination of the

Secretary was final and no change could have been made in the amount. Having failed to file a petition in The Tax Court, Spaulding was in no position to say to an equity court, "I have done everything to protect myself from injury that I can under the statute. I have done it at the time and in the manner provided, but I am still going to sustain an irreparable injury, if you do not aid me." That is appellant's position here.

It is also to be noted that the Court in the *Spaulding* case said, at page 423:

> "Appellants, with the burden of proof, do not allege that any of the 1942 contracts from which the excessive profits were realized were entered into prior to its enactment."

But here appellant alleged that $2,780,009.82 of a total sales in 1943 of $3,548,845.50 resulted from contracts entered into prior to April 28, 1942, when the first act was passed. Every dollar of appellant's sales in 1943 was made prior to the enactment of the Renegotiation Act (February 25, 1944). Should it be determined that such sales were not subject to renegotiation the prior determination of excessive profits made by the Board would be set aside completely or substantially reduced, even if the second act be constitutional. The uncertainty of the *amount* of excessive profits until after The Tax Court has acted illustrates the futility of suits against customers.

Is this remedy then, which requires one or possibly two suits against the customer, or one suit and an unknown procedure for refund, as plain, as adequate and as complete as an injunction which will stay collection until the Tax Court shall have acted?

In any event, we have never contended that we could not sue our customers. If we have a right to sue them, it does not excuse the persons sued by us from their

wrongdoing, because we do have such a right. Their wrongful act may not be condoned because we have this dubious right.

It is also asserted by appellees that collections will be made from only two or possibly three customers of appellant. The Renegotiation Act does not so limit the action of the War Contracts Price Adjustment Board. Because collection was made in 1944 for the year 1942 from two customers it does not follow that such will happen again. If the Secretary of War can direct two, possibly three customers to pay, he can do the same without regard to the numbers.

III.

THIS IS NOT A SUIT AGAINST THE UNITED STATES.

Appellees assert that this is a suit against the United States; that because the United States cannot be sued without its consent, and because it has not so consented, the action must be dismissed.

Before discussing cases cited by appellee, it must be observed that the nature of the proceedings is the true test in respect of whether the Government is actually a party litigant. *Ex parte State of New York*, No. 1, 256 U.S. 490, 500.

This case is unlike the case of *Mine Safety Co.* v. *Forrestal*, 326 U. S. 371, where the nature of the suit was to collect a claim against the Government by enjoining the Secretary of the Navy from taking such action as would stop payment by the Government of Mine Safety's claim. This he could do only as Secretary of the Navy and not as an individual. This Court properly said that the suit was actually one against the United States.

In the case of *Minnesota* v. *Hitchcock*, 185 U. S. 373, the United States owned land, title to which was claimed by the State of Minnesota. The action was brought to enjoin the Secretary of the Interior from selling the land. A decree enjoining him from doing so would impliedly determine that the lands belonged to the State. The court found that the United States had consented to be sued. In that case, of course, Hitchcock, the Secretary of the Interior, was sued in his capacity as Secretary of the Interior and Commissioner of the General Land Office. It was not claimed that Hitchcock personally was doing any act pursuant to a void statute. On the contrary, it was claimed that he was acting for the United States. It is not to be wondered that under the circumstances the action was deemed to be one against the United States.

In *Louisiana* v. *McAdoo*, 234 U. S. 627, the State of Louisiana sought to obtain permission to sue the Secretary of the Treasury to compel him to adopt a construction of the tariff laws which was different from that he had adopted. Without going into the merits of its contention, this Court held that if the prayer of the petition should be allowed, the court would be permitting a suit against the United States.

The Court said (p. 632):

> "Obviously such suits to review the official action of the Secretary of the Treasury in the exercise of his judgment as to the rate which should be exacted under his construction of the Tariff Acts would operate to disturb the whole revenue system of the Government and affect the revenues which would arise therefrom. Such suits would, obviously, in effect, be suits against the United States."

In *Belknap* v. *Schild*, 161 U. S. 10, a bill was filed for an infringement of a patent. It appeared that some of

the defendants were officers of the United States Navy which had used and were using a caisson gate, which was said to infringe plaintiff's patent.

The Court said (p. 25):

> "If the gate was made in infringement of the plaintiff's patent, that did not prevent the title in the gate from vesting in the United States."

The prayer of the bill asked that the defendants be enjoined from using the gates already installed and that they be destroyed. Obviously this was a suit against the United States.

We do not assert that the parties named in a complaint determine the question of whether a suit is one against the United States. But so far as we are aware, it has never been doubted that where one invaded the property rights of another, he may not justify his conduct by virtue of an enactment of the Congress which is unconstitutional.

In *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 620, this Court said:

> "The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States."

Here, as there, the authority of the individuals is challenged to do the things of which the complaint is made. This suit rests upon the charge of lack of power.

Would it seriously be contended that the conduct of the individuals who are members of the purported War Contracts Price Adjustment Board or the individuals who are Secretary of War and Under Secretary of War,

is legal and proper except for the acts? If the acts be unconstitutional, could it be said that the acts justified them in their conduct? This court has answered "No" to these questions many times.

The court said, in *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 620:

> "And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments. *Osborn* v. *Bank of United States*, 9 Wheat. 738, 843, 868; *Davis* v. *Gray*, 16 Wall. 203; *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 10; *Scott* v. *Donald*, 165 U. S. 107, 112; *Smyth* v. *Ames*, 169 U.S. 466; *Ex parte Young*, 209 U. S. 123, 159, 160; *Ludwig* v. *Western Union Telegraph Co.*, 216 U. S. 146; *Herndon* v. *C., R. I. & P. Ry. Co.*, 218 U. S. 135, 155; *Hopkins* v. *Clemson College*, 221 U. S. 636, 643-645. And it is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred. *Noble* v. *Union River Logging R. R. Co.*, 147 U. S. 165, 171, 172; *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94."

It was said in *Ickes* v. *Fox, et al.*, 300 U.S. 82, pp. 96, 97:

> "The suits do not seek specific performance of any contract. They are brought to enjoin the Secretary of the Interior from enforcing an order, the wrongful effect of which will be to deprive respondents of vested property rights not only acquired under Congressional acts, state laws and government contracts, but settled and determined by his predecessors in office. That such suits may be maintained without the presence of the United States has been established by many decisions of this court, of which the following are examples: *Noble* v. *Union River Logging R. Co.*, 147 U. S. 165, 171-2, 176; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619; *Goltra* v. *Weeks*, 271 U. S. 536, 544; *Work* v. *Louisiana*, 269 U. S. 250, 254; *Payne* v. *Central Pacific Ry. Co.*, 255 U. S. 228,

238. These decisions cite other cases to the same effect.

The appellees suggest (Appellees' Brief, p. 43) that the appellant is requesting that the appellees be enjoined from suing appellant in a court. No justification may be found in the record for this statement. It is suggested also that, because the United States would necessarily be a party to such a suit, if instituted, that makes this proceedings a suit against the United States. This of course, begs the question of whether the United States could maintain such a suit relying upon an unconstitutional statute, as this is averred to be. It is one thing to enjoin an officer of the United States from doing an act in his official capacity and quite another to enjoin the individual who happens to be an officer from doing an act which he cannot justify as an official. It is one thing to require payment of money from the Treasury of the United States and quite another to resist payment to the Treasury of the United States.

We quite agree that if the money had been collected and were in the Treasury of the United States, and we sought repayment thereof, this case would have been like the *Mine-Safety Appliances* case. The point is that such is not the fact. It was for this reason that we carefully avoided asking for payment of the $204,000 already, illegally paid into the Treasury of the United States.

It is for this reason that appellant carefully averred that it has no contracts with the United States and that no money is now due to it from the United States; and, that the money in question is money owed to appellant from customers other than the United States.

As we understand the doctrine of *Ford Co.* v. *Dept. of Treasury*, 323 U. S. 459, the court held that a taxpayer could not bring a suit in a Federal Court against the

State of Indiana which had consented to be sued in its own courts. This would be in violation of the 11th Amendment. That case has no applicability to support the proposition that Congress has sought to bar jurisdiction of District Courts to forbid unconstitutional exactions on an individual pending the issuance of the final command of the administrative body chosen by statute to make such final command.

IV.

(A) On page 33 of their brief, appellees refer to the case of *Hirabayshi* v. *U. S.* 320 U. S. 81, which was quoted in part in *Spaulding* v. *Douglas*, 154 Fed. (2d) 419. Advancing this case as their authority, they contend that the amendment passed October 21, 1942, to the first renegotiation act (April 28, 1942) effected an adoption by the Congress of the factors then being used by the War Department in the determination of "excessive profits." Whether or not such result follows is immaterial in a consideration of the Renegotiation Act (February 25, 1944) since, in that act, Congress specifically enumerated certain factors to be considered, not excluding others, for the determination of excessive profits.

Since appellant alleges that the first act (April 28, 1942), with all amendments thereto prior to February 25, 1944, is unconstitutional (Rec. p. 153, Par. 24; p. 159, Par. 40) if construed to give the right to the Secretary to make a determination of excessive profits in the absence of any agreement with the contractor, consideration must be given to appellees' position. This Court decided in the *Hirabayshi* case that the subsequent enactment by Congress of a law, at a time when Lt. Gen. DeWitt's orders were before it, operated as an adoption of the military regulations so issued by that commander.

On October 21, 1942, when the amendment to the first renegotiation act was passed, there were three agencies renegotiating war contracts, the Navy, the Army and the Maritime Commission. The factors of the three agencies were not the same. To say that the passage of the amendment adopted the War Department's factors under these circumstances ignores the principle of the *Hirabayshi* case since there could be no selection of War Department's factors to the exclusion of others then being used.

On October 21, 1942, at the time of the adoption of the amendment the Congress also had before it the War Department's administrative construction of the Act as made by appellee Patterson, then Under Secretary of War, in charge of renegotiation for the War Department, to the effect that renegotiation implied "agreement, mutual agreement", between the contractor and the Secretary. It may be said that under the doctrine of the *Hirabayshi* case the Congress adopted, in amending the act, the administrative interpretation of Mr. Patterson. Such an interpretation precludes the making of a unilateral determination. Accordingly, there is no point in discussing the "factors" which Congress may have adopted. Nothing could have been done under the first act without appellant's agreement. It made no agreement.

But, if it be assumed that the Congress by the amendment of October 21, 1942, did not adopt Mr. Patterson's construction, and, if it also be assumed that by the amendment of October 21, 1942, the Congress, without so stating, adopted the War Department's factors, to the exclusion of those of the Navy or the Maritime Commission, the fact still remains that the factors so adopted in that manner are too indefinite and too uncertain as to satisfy the rule of standards applicable to delegated authority.

Appellees assert (p. 40 of their brief) that if the Government brought suit against the appellants to collect sums

determined to be excessive war profits, appellant clearly would have an adequate remedy at law. The obvious answer to this is that appellant has no control over the institution of suit by the Department of Justice on behalf of the Government. It is not an adequate remedy at law of which appellant could avail himself. But if such an action had been instituted by the Government, the appellant would have had no opportunity to resist the demand for excessive profits which were then and now undetermined, in view of the fact that the Tax Court, which has exclusive right to determine the amount of excessive profits in this case, had not and has not acted. All that has been said heretofore relative to suits against customers, prior to the action of the Tax Court, applies with equal force to suits by the United States.

CONCLUSION

The appellees have elected to avoid a consideration of the Constitutional questions discussed in appellant's original brief except in a fragmentary fashion, which are fully answered in this brief. They have elected to stand on the procedural questions involved.

In its amended and supplemental complaint, appellant prayed that an interlocutory injunction issue and that upon a hearing a permanent injunction issue upon the allegations that the Renegotiation Act was wholly void. In the alternative, appellant prayed that an injunction issue pending a redetermination by The Tax Court, for the reason that insofar as the Section (e) (1) of the Renegotiation Act authorizes the collection of "excessive profits" as determined by the War Contracts Price Adjustment Board, before The Tax Court has acted, it was violative of the due process clause of the Fifth Amendment. Under the general relief clause, appellant's contention is that, if the first act as now interpreted by the Secretaries, authorizing them

to issue unilateral orders determining excessive profits, is unconstitutional, as appellant alleged it to be, then a court of equity might and should diminish the amount, if any, due under the second act, by the amount already illegally collected under the first act.

We have established that the appellant is about to be irreparably injured by the unlawful acts of the persons who are members of the War Contracts Price Adjustment Board and the persons who are the Secretary of War and Under Secretary of War. We have established that the acts are wholly unconstitutional, and should be so declared.

If, however, the record now does not permit such action then this Court should, we contend, remand the case to the District Court, to enjoin the appellees in their purpose to collect from appellant's customers, until The Tax Court shall have acted.

We make no contention that the government was without power to draft every plant in America to successfully prosecute a war. Congress elected not to exert this power. It elected to attain its goals in matters of procurement by other methods. Having done so, it is no answer to the propositions we have advanced that we were engaged in a war.

Congress is not invested with the power to wage war in an unconstitutional manner.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946

No. 95

AIRCRAFT & DIESEL EQUIPMENT CORPORATION,
Appellant,

vs.

MAURICE HIRSCH, E. D. McDOUGAL, JOHN R. PAUL, *et al.*,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

REPLY BRIEF FOR AIRCRAFT & DIESEL EQUIPMENT CORPORATION, APPELLANT.

ERRATA

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ERRATA

Cover. Add the name David R. Gallagher to names "Of Counsel".

Exscind pages i and ii and substitute the following therefor:

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Line 11. Exscind as page reference "24" and substitute therefor *26, 27*.

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Line 19 et seq. Exscind beginning with "Statutes Cited" and substitute the following:

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Line 3. Substitute (*brief, p. 16*) for "(p. 16)".

Line 6. Substitute *authoritatively* for "authoratatively".

Line 11. Substitute *effect* for "affect".

Line 23. Substitute (*Rec. 166-167* for "Rec. 167)".

Page 3

Line 5 from bottom. Substitute *Section 403 (c) (1).* (*Appellees' App. p. 27*) for "(Section 403 (c) (1), Appellees' App. p. 27)".

Page 4

Line 2 from bottom. Substitute *administrative* for "Administrative".

Page 5

Line 6. Substitute *were* for "was".

Page 6

Line 11. Substitute *It* for "He".

Line 12. Substitute *its* for "his".

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Line 7 from bottom. Substitute *whom* for "who".

Line 4 from bottom. Exscind colon.

Page 11

Line 19. Add (*p. 211*):

Page 12

Line 10. Substitute *Federal Communications Com'n* for "Comm'n".

Line 3 from bottom. Exscind "either".

Page 15

Line 4. Substitute *demonstrates* for "demonstrate".

Line 7. Substitute *21* for "20".

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Line 2 from bottom. Substitute *could* for "can".

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Line 6. Substitute *290* for "200".

Line 8. Exscind comma after "case".

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Line 14. Add (*brief p. 32 n.*)

Line 21. Add (*p. 528*).

Line 22. Substitute *these grants* for "those grants".

Line 3 from bottom. Substitute *267* for "167".

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Line 7. Substitute *poisonous* for "poisonuous" and *impure* for "impre".

Line 15. Add comma after "*Macy*".

Line 18. Substitute *pp. 34-35* for "p. 34".

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Line 9. Add after word "said" (*pp. 316, 317*).

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Line 5 from bottom. Exscind "would".

Page 32

Line 10 from bottom. Exscind comma.

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Line 10. Substitute "*The* Tax Court" for "the Tax Court".

Line 14. Substitute "*The* Tax Court" for "the Tax Court".

Respectfully submitted,

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No. 95

In the Supreme Court of the United States

OCTOBER TERM, 1946

AIRCRAFT & DIESEL EQUIPMENT CORPORATION,
APPELLANT

v.

MAURICE HIRSCH ET AL.

ON APPEAL TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEES

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OPINION BELOW

The opinion of the District Court of the United States for the District of Columbia (R. 430–436) is reported at 62 F. Supp. 520.

JURISDICTION

The judgment of the district court was entered on March 5, 1946 (R. 439). The petition for appeal was presented on March 29, 1946 (R. 449), and allowed on April 3, 1946 (R. 460–461). The jurisdiction of this Court to review the judgment complained of is conferred by Section 3 of the Act

of August 24, 1937. On May 27, 1946, this Court noted probable jurisdiction (R. 469).

QUESTION PRESENTED

Whether, in a suit by appellant seeking (1) a declaratory judgment that the Renegotiation Act is unconstitutional and (2) an injunction restraining appellees from proceeding to collect excessive profits determined to have been realized by appellant, the court below erred in dismissing the complaint on the grounds that the suit was premature and that equity had no jurisdiction.

STATUTE INVOLVED

The statute pursuant to which a determination was made of excessive profits realized by appellant during its fiscal year ending November 30, 1943, is Title VII of the Revenue Act of 1943, c. 63, 58 Stat. 21, 78, 50 U. S. C. App., Supp. V, 1191, which became effective February 25, 1944. This statute amended the Renegotiation Act which first became law on April 28, 1942.[1] The text of

[1] The original Renegotiation Act was contained in Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, approved April 28, 1942, c. 247, 56 Stat. 226, 245, and was amended by the Revenue Act of 1942, approved October 21, 1942, c. 619, 56 Stat. 798, 982, the Military Appropriation Act, 1944, approved July 1, 1943, c. 185, 57 Stat. 347, the Act of July 14, 1943, c. 239, 57 Stat. 564, the Revenue Act of 1943, approved February 25, 1944, c. 63, 58 Stat. 21, 78, and the Act of June 30, 1945, c. 210, 59 Stat. 294 (50 U. S. C. App., Supp. V, 1191).

the final form of the Renegotiation Act, together with the text of the original statute and intervening amendments, is set forth in a separate pamphlet (Appendix) filed with this brief and entitled "The Renegotiation Act." Section 701 (b) of the Revenue Act of 1943 amended Section 403 of the Act of April 28, 1942, so that it provided, insofar as here pertinent, as follows:

Section 403 (a) (Appendix, pp. 18–25) defines the terms employed in the Act, including an elaborate and detailed definition of "excessive profits."

Section 403 (b) (Appendix, pp. 25–27) directs the Secretaries of the Departments to insert in Department contracts provision for the elimination of excessive profits through renegotiation, provision for retention by the United States of excessive profits or repayment of such profits to the United States, and a provision requiring prime contractors to insert similar clauses in subcontracts.

Section 403 (c) (1) (Appendix, pp. 27–29) directs the War Contracts Price Adjustment Board to give notice of renegotiation proceedings; authorizes attempts to agree with the contractor as to the amount to be refunded to the United States; directs the issuance of an order for the elimination of excessive profits if no agreement is reached; provides for renegotiation on the basis of total renegotiable contracts rather than on the basis of separate contracts; and provides that

upon demand a statement shall be furnished to the contractor of the basis of and the reasons for the Board's determination.

Section 403 (c) (2) (Appendix, pp. 29–30) directs the elimination of excessive profits either by reductions in the amounts payable to the contractor under contracts with the Departments, or by withholding payments otherwise due the contractor, or by directions to prime contractors to withhold for the United States sums otherwise due a subcontractor, or by court action brought on behalf of the United States; provides that the United States shall indemnify each contractor against all claims by subcontractors on account of withholdings; and provides for appropriate fiscal operations in the Treasury Department.

Section 403 (e) (Appendix, pp. 37–39) provides for a redetermination of a renegotiation order by the Tax Court; that each contractor or subcontractor shall be entitled to *de novo* redetermination in that court of the amount of his excessive profits; that the determination of the Tax Court as to the amount of such excessive profits shall be final and conclusive; and that the filing of a petition with the Tax Court shall not stay execution of the order of the Board.

STATEMENT

This is an appeal from a judgment of a specially constituted three-judge court, convened pursuant to Section 3 of the Act of August

24, 1937, c. 754, 50 Stat. 751, 752, 28 U. S. C. 380a; dismissing a suit by appellant, Aircraft & Diesel Equipment Corporation, seeking to obtain a declaratory judgment that the Renegotiation Act is unconstitutional and to restrain appellees, members of the War Contracts Price Adjustment Board, the Secretary of War, and the Under Secretary of War,[2] from proceeding to collect under the provisions of the Renegotiation Act profits determined to be excessive (R. 164–168).

Appellant is a corporation organized under the laws of the State of Delaware and having its principal office and place of business at Chicago, Illinois (R. 133). Its business is the manufacture of diesel fuel injection equipment and precision parts and also aircraft precision parts (R. 134). It employs the accrual method of bookkeeping and keeps its accounts and makes its federal income tax returns each year on the basis of a fiscal year ending November 30th (R. 135).

Pursuant to the Renegotiation Act, representatives of the Secretary of War commenced renegotiation proceedings with appellant for the fiscal year ended November 30, 1943, with respect to the aggregate of the amounts received or accrued by appellant under contracts with

[2] On April 2, 1946, the district court entered an order substituting the present appellees as the respective successors in office to defendants named in the original action (R. 459).

the Departments and subcontracts as defined in the Renegotiation Act.[3] It was determined that appellant's dollar volume of sales for the fiscal year 1943 amounted to $3,549,000, that $3,520,000 of this amount was renegotiable, and that appellant's profits on renegotiable sales during 1943 amounted to $1,526,000 before taxes, or 43.3 percent of sales (R. 121).[4]

[3] With the exception of one small Navy contract, all of the contracts involved were subcontracts.

[4] Appellant also alleges that the sum of $204,000, determined by the Under Secretary of War to be excessive profits for the fiscal year ending November 30, 1942, after making due allowances for taxes, was illegally exacted from it, particularly on the ground that the Sixth Supplemental National Defense Appropriation Act of 1942 (56 Stat. 226, 245), to the extent that it authorized such renegotiation, was unconstitutional. The sum in question has been paid into the Treasury of the United States by customers of the appellant. (R. 135–137.) Appellant has filed with, and there is now pending in, the Tax Court, a petition to review this renegotiation order (R. 136; appellant's brief, p. 10). The prayer of the amended complaint (R. 164–168) asks for no specific relief in respect of this sum of money nor does it request that that part of the 1942 Act providing for renegotiation be declared unconstitutional. All relief prayed for relates to the constitutionality of the Renegotiation Act of 1943, to the excessive profits which appellant had been held to have realized for the fiscal year ending November 30, 1943, and to the threats that appellant's customers would be directed to withhold for the account of the United States the sum of $270,000. See appellant's brief, pp. 5–6. The theory of the appellant (brief, p. 22) appears to be that if the first Act be unconstitutional or if the action taken by the renegotiation authorities exceeded the powers conferred by the Act, the $204,000 has been illegally collected; and that if the second Act should be held to be constitutional and the $270,000 properly deter-

In the course of the renegotiation proceedings, conferences were held in Washington between representatives of the Secretary of War and appellant. In connection with the conferences, there were submitted by the appellant and obtained from governmental or other reliable sources, certain financial, operating and other data relating to appellant's business and profits derived during 1943. Appellant was afforded full opportunity to submit such information and to present such contentions as it deemed material to a determination of excessive profits within the meaning of the Act. In determining the amount of excessive profits, due consideration was given to all such financial, operating and other data and information so furnished or obtained, to each of the contentions presented, and to all of the factors referred to in Subsection 403 (a) (4) (A) of the Act. (R. 168–169.)

As a result of the renegotiation proceedings, it was determined that of the appellant's profits before federal taxes on renegotiable sales in the

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mined to be excessive profits, then the $204,000 should be credited against it as a set-off. Appellant specifically disclaims any request for repayment of the $204,000 should both Acts be determined to be unconstitutional, although it does state that it would be entitled to repayment of that amount (appellant's brief, p. 22).

In view of appellant's theory, the propriety of the $204,000 withholding assumes importance in the instant case only in the event that the court below is held to have had jurisdiction to reach the constitutional questions. It does not affect the arguments presented in this brief supporting the district court's decision that it lacked such jurisdiction.

fiscal year 1943, $1,265,000 represented excessive profits within the meaning of the Renegotiation Act (R. 169). An order to that effect was entered on January 11, 1945, by Robert P. Patterson, Under Secretary of War, acting on behalf of the War Contracts Price Adjustment Board (R. 168–170). On January 11, 1945, appellee Patterson advised appellant of the determination of excessive profits and enclosed a copy of the order. The letter further advised appellant that as provided in the Act, such order might, in the discretion of the Board, be reviewed by the Board upon appellant's request, or upon the Board's own motion, but unless the review were initiated within the time prescribed by the Act the order would be deemed the determination of the Board. (R. 173.)

On February 28, 1945, appellant filed with the Board a request that it initiate a review of the order of January 11, 1945 (R. 140). By letter dated May 3, 1945, the Board advised appellant that no review of such order had been initiated and that accordingly such order was to be deemed the determination of the Board (R. 174–175). The Board's letter also stated that it had been advised by the Bureau of Internal Revenue that the tax credit, as provided in Section 3806 of the Internal Revenue Code, applicable to appellant's excessive profits of $1,265,000, amounted to $994,-

235.28, and that assuming the correctness of the basis upon which the computation of the tax credit was made, the balance due the Treasury of the United States was $270,764.72. Appellant was further advised that interest at the rate of 6 percent per annum would accrue from and after May 18, 1945 on any amount due and unpaid.

Section 403 (c) (2) of the Renegotiation Act (Appendix, pp. 29–30) provides various methods for the elimination of excessive profits. The method proposed to be followed for the elimination of excessive profits determined to have been realized by appellant was described by Colonel Maurice Hirsch, Chairman of the War Contracts Price Adjustment Board and the War Department Price Adjustment Board, in his affidavit dated June 9, 1945, as follows (R. 117–118):

> An investigation has been made by the War Department with respect to the possible methods for the elimination of the excessive profits found to have been realized by Aircraft & Diesel Equipment Corporation during its fiscal year ending November 30, 1943. The investigation has failed to disclose that there are any sums now owing from the United States to the Corporation and, accordingly, the excessive profits cannot be eliminated by withholding sums otherwise payable from the United States to the Corporation. The investigation has disclosed, however, that there are

> contractors doing business with the United States who owe various sums of money to the Corporation. It has been decided that the interests of the Government will be served by issuing withholding orders to two or possibly three of such contractors and it has accordingly been determined that the collection method to be adopted in this case will be the issuance of withholding orders to two or possibly three of such contractors. If this method of collection does not result in a discharge of the claim a recommendation will be made to the Attorney General that suit be brought by the United States against the Corporation to compel payment of the claim.

On April 4, 1945, the appellant filed with the Tax Court of the United States, pursuant to the provisions of Section 403 (e) (1) of the Act (Appendix, pp. 37–38), a petition requesting a determination *de novo* of the amount, if any, of its excessive profits realized during its fiscal year ended November 30, 1943 (R. 142). The United States filed a motion to strike this petition on the ground that it was filed during the time when the War Contracts Price Adjustment Board might initiate a review (R. 142). The motion was heard before the Tax Court on May 16, 1945 (R. 142) and was subsequently granted. Thereafter, on July 2, 1945, appellant filed another petition with the Tax Court for a determination of its excessive profits, if any, for the fiscal year 1943 (R. 175–

192, 443). This proceeding is still pending.[5] This petition raised not only issues as to the constitutionality of the statute, but other questions, including contentions that appellant had realized no excessive profits, that certain sales were exempt from the Act, and that the compensation paid appellant's officers was reasonable and a proper element to be included in costs (R. 191, 181–184).

On May 19, 1945, appellant instituted this suit in the District Court of the United States for the District of Columbia (R. 1–3). In its amended and supplemental complaint, filed July 2, 1945, appellant sought a declaratory judgment that the Renegotiation Act is unconstitutional, or, if the several sections of the Act be deemed separable and not all unconstitutional, that Sections 403 (c) (2) and (e) (1) be declared unconstitutional (R. 133). Appellant also sought injunctive relief restraining appellees from further proceeding under the Renegotiation Act and particularly under Sections 403 (c) (2) and (e) (1) (R. 133). In addition, appellant sought injunctive relief restraining appellees from taking any further action in respect of the renegotiation order pend-

[5] We are advised by the Clerk of the Tax Court of the United States that the three cases involving excessive war profits of appellant for the respective fiscal years ending November 30th in 1942, 1943, and 1944, which cases have the Tax Court docket numbers 9–R, 228–R and 559–R, will be set for hearing on a calendar of cases scheduled to be held by a Division of the Tax Court in Chicago, Illinois, beginning February 24, 1947.

ing a redetermination by the Tax Court (R. 133).

At appellant's request, a statutory three-judge district court was convened. Appellees moved to dismiss the complaint and for summary judgment (R. 3–4). On September 28, 1945, the court entered its opinion (R. 430–436), and on March 5, 1946, entered an order denying appellant's motion for an interlocutory injunction and granting appellees' motions to dismiss the amended and supplemental complaint and for summary judgment (R. 439). The order provided, however, that it was entered without prejudice to the right of the appellant to maintain actions at law against its debtors and to bring suit as it may be advised in the Court of Claims (R. 439).

The court held that appellant's suit was premature as it had failed to exhaust its administrative remedy before the Tax Court (R. 433–436). In addition to this, the court held that "equity has no jurisdiction for the reason that the plaintiff has complete remedies by actions at law" (R. 434).

On April 3, 1946, the district court entered an order allowing an appeal to this Court and granting appellant's motion to enjoin appellees pending appeal upon the posting of a bond in the sum of $100,000 (R. 460–461).

SUMMARY OF ARGUMENT

I

Inasmuch as appellant's petition before the Tax Court is still pending, this case is premature re-

cause appellant has failed to exhaust its administrative remedies. *Macauley* v. *Waterman Steamship Corp.*, 327 U. S. 540, is controlling. The statutory remedy is not inadequate because of any failure by Congress to assure payment of refunds ordered by the Tax Court; Congress has provided for such refunds with interest. Appellant's claim that its remedy is inadequate because the Tax Court's determination is not subject to judicial review is premature, as it was in the *Waterman* case. The *Waterman* decision also disposes of the argument that the possible necessity of multiplicity of suits permits disregard of the exhaustion doctrine. The fact that the administrative process has gone further in this case than in *Waterman* does not distinguish the cases, as long as the remedy before the Tax Court has not been exhausted.

Appellant's contention that the exclusive administrative remedy provided by the statute need not be exhausted because the sums claimed to be due may be collected, by withholding, prior to the conclusion of the administrative proceeding is refuted by *United States* v. *Ruzicka*, No. 54, this Term, decided December 16, 1946. In any event, a system of collection by the Government in advance of litigation but subject to refund when the collection is unlawful provides an adequate remedy, as the analogy of tax law attests.

The exhaustion doctrine applies even though a

constitutional question is raised. The Tax Court can resolve appellant's constitutional issues along with the other questions, and may make disposition of the constitutional questions completely unnecessary. Cf. *Alma Motor Co.* v. *Timken Co.*, No. 11, this Term, decided December 9, 1946. In any event there is no merit to the contention that the Act is unconstitutional *in toto*.

II

If sums are withheld by appellant's customers at the order of the Government, appellant has an adequate remedy at law by way of action against them which the United States would in fact defend. The record in this case indicates that there would not be any multiplicity of such suits. The adequacy of this remedy at law in itself defeats the jurisdiction of equity to grant injunctive relief. *Coffman* v. *Breeze Corporations*, 323 U. S. 316.

III

Inasmuch as the sums to be withheld by contractors are to be turned over to the United States and the contractor indemnified by the United States, this case is in substance one against the United States to which Congress has not consented. The case is not substantially different from *Mine Safety Appliances Co.* v. *Forrestal*, 326 U. S. 371, which involved another stage of the renegotiation process.

ARGUMENT

INTRODUCTION

The district court, properly we submit, held that it was without jurisdiction to grant the injunctive relief for which appellant prayed, both because appellant had an adequate remedy at law and because the suit was premature, appellant having failed to exhaust its administrative remedies.[6] The decision is in accord with the decisions of two other three-judge district courts in the District of Columbia on the same question. *Wade* v. *Stimson*, 65 F. Supp. 277 (D. D. C.), pending on appeal No. 724; *Knowles* v. *Hirsch*, 65 F. Supp. 690 (D. D. C.). The court below relied heavily upon the decision of this Court in *Coffman* v. *Breeze Corporations*, 323 U. S. 316, in concluding that there was no equity jurisdiction because appellant had an adequate remedy at law. It also held that the suit was premature because appellant had not exhausted its administrative remedies, a holding which accords with the subsequent pronouncement of this Court in *Macauley* v. *Waterman Steamship Corp.*, 327 U. S. 540. While either of these grounds alone is adequate to dispose of appellant's contention,

[6] While the opinion below did not discuss the question of a declaratory judgment, it is clear that such relief was denied because "The same principles which justified dismissal of the cause insofar as it sought injunction justified denial of the prayer for a declaratory judgment." *Macauley* v. *Waterman Steamship Corp.*, 327 U. S. 540, 545.

another reason—namely, that the action constitutes a suit against the United States—finds support in the decision of this Court in *Mine Safety Appliances Co.* v. *Forrestal*, 326 U. S. 371, decided after the opinion below.[7] We submit that the rationale of any one of these three decisions required the court below to dismiss appellant's complaint.

The court below reached only the jurisdictional questions and did not consider the merits of the case. Although we have no desire to prevent a decision by this Court as to the constitutionality of the Renegotiation Act, which has already been sustained in *Spaulding* v. *Douglas Aircraft Co.*, 154 F. 2d 419 (C. C. A. 9) and *United States* v. *Alexander Wool Combing Co.*, 66 F. Supp. 389 (D. Mass.), we submit that the decision of the court below was so clearly correct and the jurisdictional questions in this case so pervasively controlling, that it is neither necessary nor appropriate to discuss the merits of the case or the constitutional arguments which appellant so vigorously urges.

I

THE APPELLANT MUST EXHAUST ITS TAX COURT REMEDY BEFORE RESORTING TO THE COURTS

Appellant, on July 2, 1945, filed with the Tax

[7] In *Wade* v. *Stimson*, *supra*, the court, while resting primarily upon *Macauley* v. *Waterman Steamship Corp.*, *supra*, also placed reliance upon *Mine Safety Appliances Co.* v. *Forrestal*, *supra*.

Court of the United States, pursuant to Section 403 (e) (1) of the Renegotiation Act, its petition for a determination of excessive profits, if any, which it had realized during the fiscal year ended November 30, 1943. That subsection provides that "upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency." It is also there provided that the proceeding before the Tax Court "shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding *de novo.*" The proceeding in the Tax Court is still pending. In the Tax Court appellant is raising not only the constitutional questions sought to be presented here, but other issues (R. 181–184). If it prevails in that court, the Under Secretary's finding of excessive profits would, of course, be set aside.

A consequence of this statutory scheme is that until the Tax Court acts appellant has not exhausted its administrative remedies. The doctrine of exhaustion, as applied to the Tax Court, rests both upon the "long settled rule of judicial administration" (*Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50–51), and upon the specific provisions of the Renegotiation Act itself, which expressly vests "exclusive jurisdiction" in the Tax

Court and hence divests the district court of jurisdiction concerning renegotiation matters, at least in the first instance.[8]

In *Macauley* v. *Waterman Steamship Corp.*, 327 U. S. 540, at the last Term, this Court held the exhaustion doctrine applicable to the procedure established under the Renegotiation Act for both of the above reasons.[9] The *Waterman* case would appear to be decisive here. Appellant does not, as we read its brief, even attempt to distinguish the *Waterman* decision.

None of the arguments which appellant advances justifies a different result than that reached in the *Waterman* case.

1. *Provision for refunds.*—Appellant argues, as did *Waterman*,[10] that the Tax Court remedy is inadequate because even if it should prevail in the Tax Court, or eventually in other courts, there is no statutory provision or appropriation by which repayment to it of any amount withheld or previously collected can be assured. This

[8] The jurisdiction of the Tax Court is at least an "exclusive initial power" (*Newport News Shipbuilding Co.* v. *Schauffler*, 303 U. S. 54, 57), whatever may be the ultimate power of judicial review in the courts.

[9] It is to be noted that here, as in the *Waterman* case, appellant seeks to separate the claim presented to the Tax Court into two parts, or part to be heard preliminarily by the district court and by this Court, and the other eventually by the Tax Court if this Court's decision does not dispose of the whole case by holding the statute unconstitutional.

[10] See brief in opposition, pp. 39–42, October Term 1945, No. 435.

is clearly wrong. In the first place the right of refund is clearly implicit in the Act itself. As Congressman Disney, a sponsor of the Act and committee member, expressly stated in the congressional debates, "When the contractor appeals to the Tax Court, there is no stay of the recapture of the money but, of course, a decision by the Tax Court in his favor would entitle him to a refund of amounts that had been recaptured." (89 Cong. Rec. 9929). Pursuant to the obligation established by the Renegotiation Act,[11] Congress has made appropriations for refunds of "any amount finally adjudged or determined to have been erroneously collected by the United States pursuant to unilateral determination of excessive profits, with such interest thereon (at a rate not to exceed 4 per centum per annum) as may be adjudged or determined to be owing in law or equity * * *" (First Deficiency Appropriation Act, 1945, Act of April 25, 1945, 59 Stat. 77, 90; Third Deficieney Appropriation Act, 1946, Pub. Law No. 521, 79th Cong., 2d Sess., approved July 23, 1946.)[12] These statutes cover the fiscal years

[11] See Hearings before Subcommittee of the Commictee on Appropriations, United States Senate, 79th Cong., 1st Sess., on the First Deficiency Appropriation Bill, 1945, on H. R. 2374, p. 256.

[12] Concerning refunds under the Renegotiation Act, the Third Deficiency Appropriation Act, 1946, provides:

"Refunds under Renegotiation Act: To enable the Secretary of the Treasury to make the refunds during the fiscal year 1947, including refunds for prior years, required by section 403 (a) (4) (D) (relating to the recomputation of

1946 and 1947, and it can not be assumed that Congress will not make similar provision for the future in order to carry out the promise implicit in the Renegotiation Act.

2. *Interest.*—The statutes just quoted, it is to be noted, contain provision for 4 percent interest. They therefore also dispose of appellant's suggestion that its statutory remedy is inadequate because any refund would not bear interest. The Congress, however, may lawfully authorize collection in advance without provision for interest on subsequent refunds (see *Nichols* v. *Gaston,* 281 Fed. 67, 70 (C. C. A. 1)). The provisions of the Agricultural Marketing Agreement

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the amortization deduction) and by the last sentence of section 403 (i) (3) (relating to excess inventories) of the Renegotiation Act; and to refund any amount finally adjudged or determined to have been erroneously collected by the United States pursuant to a unilateral determination of excessive profits, with such interest thereon (at a rate not to exceed 4 per centum per annum) as may be adjudged or determined to be owing in law or equity; $15,000,000, together with the unused portion of the $15,000,000, authorized for this purpose in the First Deficiency Appropriation Act, 1945: *Provided*, That to the extent refunds are made from this appropriation of excessive profits collected under the Renegotiation Act and retained by the Reconstruction Finance Corporation or any of its subsidiaries, the Reconstruction Finance Corporation or the appropriate subsidiary shall reimburse this appropriation: *Provided, further*, That the War Contracts Price Adjustment Board or its duly authorized representative shall certify the amount of any refund to be made in pursuance hereof to the Secretary of the Treasury who shall make payment upon such certificate in lieu of any voucher which might otherwise be required."

Act of 1937 (§ 8c (15) (A)–8c (15) (B)) enforced in *United States* v. *Ruzicka*, decided December 16, 1946, contain no provision for interest, and interest has never been allowed on refunds.[13]

3. *Absence of judicial review.*—Appellant argues that its statutory remedy is inadequate because the Act specifically provides that the Tax Court's determination is not subject to court review. The same contention was held in the *Waterman* case not to "affect the application of the rule requiring exhaustion of administrative remedies" (327 U. S., at 545). If, after completion of the administrative process, appellant has a right to judicial review and a need to exercise it, the courts will then be in a position to provide it. Cf. *U. S. Electrical Motors, Inc.* v. *Jones*, 153 F. 2d 134 (App. D. C.).

[13] Interest was not allowed in suits against the United States arising under the internal revenue laws until Section 177 of the Judicial Code was amended by the Revenue Act of 1921 (§ 1324 (b); 42 Stat. 227, 316). Prior thereto, interest was allowed to time of final judgment in suits against collectors, but after probable cause was certified (R. S. § 989) the claim was converted into one against the United States and no interest was thereafter allowable after final judgment, even though payment was delayed for many years (*United States* v. *Sherman*, 98 U. S. 565). This limitation on the right to interest in suit for tax refunds "has never been regarded as rendering the remedy at law inadequate" under R. S. 3224 (*Nichols* v. *Gaston*, 281 Fed. 67, 70 (C. C. A. 1), although, where interest is required by the Constitution, interest to date of "final payment" must be allowed (*Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 303, 306).

4. *Multiplicity.*—Similarly the *Waterman* case specifically passed upon and rejected the argument that because appellant "would be subjected to a multiplicity of suits in order to recover the money due on the contracts" (327 U. S., at 545), it need not exhaust its administrative remedies. Indeed, even if there were sufficient multiplicity to serve as a basis for ordinary equity jurisdiction (as to which see pp. 35–36, *infra*), it would not overcome the statutory command that exclusive jurisdiction vest in the Tax Court. Cf. *Smallwood* v. *Gallardo*, 275 U. S. 56, 61–62;[14] *Di Giovanni* v. *Camden Insurance Association*, 296 U. S. 64, 69–70. As to the absence of actual danger of multiplicity of suits, see pages 9–10, *supra*.

5. *Payment in advance of administrative remedy.*—The same is true as to appellant's argument that the renegotiation order of the Board and the Tax Court can (to use this Court's language in the *Waterman* case) be enforced "without court enforcement proceedings" (327 U. S., at 545). The possibility that any amount found to be due could be withheld before the completion of the

[14] Although the multiplicity point is not specifically mentioned in this Court's opinion in the *Smallwood* case, it appears from the decision of the Circuit Court of Appeals for the First Circuit (16 F. 2d 545, 549) that multiplicity of suits was the alleged basis for equity jurisdiction. Hence this Court's statement (275 U. S., at 62) that the "general rule against injunctions [embodied in a specific statute for Porto Rico] * * * does not leave the taxpayer without power to resist an unlawful tax, whatever the difficulties in the way of resisting it" must have been intended to apply to an allegation of multiplicity.

statutory remedy, as the statute contemplates, was present in that case as well as in this one.

The cases differ in that here the administrative process has gone further than in *Waterman*. Here the Under Secretary of War has made a unilateral determination that appellant has realized excessive profits and fixed the amount thereof. But the administrative process is not completed, since the Tax Court has not rendered any decision on appellant's petition to hear the matter *de novo*.

In this case it is also alleged and admitted that, in addition to determining the amount of the excess, the appellees have threatened to direct appellant's customers to pay the amount of the excess profits to the United States rather than to appellant. This fact, appellant argues, makes the statutory remedy inadequate; it is further urged that the doctrine of exhaustion of administrative remedies applies only when the impact of the command is not felt until after the completion of the administrative process.

The possibility of a withholding prior to a final order of the Tax Court was implicit in the *Waterman* case, inasmuch as the opinion clearly indicates that judicial relief, if any, would have to await the Tax Court's ultimate decision, and since under Section 403 (e) (1) of the statute a renegotiation order may unquestionably be enforced while a proceeding is pending before the Tax Court. The opinion thus would seem to have

meant that, even if the Maritime Commission chairman had found excessive profits and ordered a withholding, an injunction suit would still not lie prior to the Tax Court's decision.

This result would clearly be correct even apart from the *Waterman* case. It may be that in some circumstances the exhaustion rule will not be applied if a party is not given adequate protection during the course of administrative proceedings (see cases cited *infra*, p. 31), although the Court has not permitted substitution of a court for an administrative body as a tribunal of original jurisdiction when the latter has been granted exclusive authority by statute. But a remedy is not regarded as inadequate because a party must pay money to the Government first, before litigating the validity of the payment, as long as the payment is recoverable if he prevails. As this Court knows, most taxes are paid pursuant to such a system of collection and subsequent refund, and there can be no question as to the constitutionality of such a scheme. See *Phillips* v. *Commissioner*, 283 U. S. 589, 593–597. Here if the sums due appellant are withheld for the account of the United States by other contractors, or if, in order to avoid litigation with its customers (see p. 39, *infra*), appellants should pay the Government directly, appellant could recover such amounts if the Tax Court, or any subsequent court in which appellant might have a right to relief, held the excess profit determination to be unlawful.

In this case, it is important to note, the exclusiveness of the administrative remedy does not rest merely on principles of equity or judicial administration but also on express statutory provisions. The Tax Court is granted exclusive jurisdiction over the subject of excessive profits much more specifically than was the Secretary of Agriculture given exclusive jurisdiction in the Agricultural Marketing Agreement Act considered by this Court in *United States* v. *Ruzicka*, decided December 16, 1946. In the *Ruzicka* case itself the respondents were ordered to pay sums demanded by the Market Administrator subject to an ultimate right of recovery if they brought, and prevailed in, an administrative proceeding with appropriate judicial review. The Renegotiation Act (Sec. 403 (e) (1)), like the Marketing Agreement Act, provided that the pendency of review proceedings shall not "stay the execution" and enforcement of the order under review. The *Ruzicka* case differs from the case at bar in that it was a suit by the Government for enforcement, not a suit to enjoin enforcement. But, *a fortiori*, if a party can not avoid the administrative process when the Government brings him to court in seeking compliance with an order, he can not do so by bringing a separate injunction suit of his own. The *Ruzicka* case demonstrates that a statute may make an administrative remedy exclusive even though the result may be payment in advance of final administrative determination of the amount

in controversy. It thus completely refutes appellant's argument that advance collection prevents Congress from making an administrative remedy exclusive.

6. *Initiation of Tax Court proceeding not sufficient to justify immediate resort to courts.*—Appellant argues that it has exhausted its remedy by filing its petition in the Tax Court, and that there is nothing further it can do. But Congress provided that the Tax Court should pass upon such matters, and unless and until the Tax Court passes adversely upon appellant's claim it cannot be known whether appellant will be forced to repay any excessive profits or need judicial relief. If the delay pending the Tax Court determination is prolonged, and harmful to appellant, appellant may ask that court to have the case expedited.[15] There is no allegation that such a step has been taken. If it should appear that the Tax Court is arbitrarily refusing to pass upon petitioner's claim—as has not been alleged—another court might properly order the Tax Court to act. But this would not justify substitution of a district court for the Tax Court as the tribunal of first instance. The possibility that appellant may be harmed by having to pay in advance the excessive profit found by the Under Secretary, thereby impairing its capital, even though the amount might ultimately be recoverable, does not

[15] Appellant's cases are scheduled for hearing by the Tax Court in the near future. See note 5, *supra*, p. 11.

warrant disregard of the statutory remedy. The same could doubtless be said in many tax cases, but the taxpayer must nevertheless pay in advance and then sue for refund.[16]

7. *Allegation of unconstitutionality does not defeat exhaustion principle.*—Finally, it may be suggested that the exhaustion of remedy doctrine does not apply when it is claimed that a statute is unconstitutional *in toto*, and on its face, as appellant contends here. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, among other cases,[17] settles that administrative remedies must be followed even though a constitutional question is raised. There the company was contending that the National Labor Relations Act could not constitutionally be applied to its operations. And this Court recently stated in *United States* v. *Ruzicka, supra*, that even when questions are "formulated in constitutional terms", the statutory procedure must be followed. We submit that the principle is the same whether the question relates to the constitutionality of the statute as

[16] See *State Railroad Tax Cases*, 92 U. S. 575, 614 ("hardship or injustice" not enough to allow injunction); *Pittsburgh &c Ry.* v. *Board of Public Works*, 172 U. S. 32, 39; *Shelton* v. *Platt*, 139 U. S. 591, 596; *Gouge* v. *Hart*, 250 Fed. 802, 806 (W. D. Va.), appeal dismissed, 251 U. S. 542.

[17] *Gorham Manufacturing Co.* v. *State Tax Commission*, 266 U. S. 265; *St. Louis-San Francisco Ry.* v. *Alabama Pub. Serv. Comm.*, 279 U. S. 560; *Dalton Machine Co.* v. *Virginia*, 236 U. S. 699; *McGregor* v. *Hogan*, 263 U. S. 234, 238; *First Natl. Bank* v. *Weld County*, 264 U. S. 450; *Lawrence* v. *St. L.-S. F. Ry.*, 274 U. S. 588; *White* v. *Johnson*, 282 U. S. 367, 373; cf. *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U. S. 160.

applied in a particular case (*Myers* v. *Bethlehem Shipbuilding Corp.*, *supra*) or to the constitutionality of the act as a whole (*Lawrence* v. *St. L.-S. F. Ry.*, 274 U. S. 588; *White* v. *Johnson*, 282 U. S. 367, 373; cf. *Gorham Manufacturing Co.* v. *State Tax Commission*, 266 U. S. 265), which, of course, is relevant only as it pertains to the particular case (*White* v. *Johnson*, *supra*).

In the one situation, as in the other, an administrative decision in favor of the aggrieved party will terminate the proceeding without the determination of any constitutional question. The reasoning of *Alma Motor Co.* v. *Timken Co.*, No. 11, this Term, decided December 9, 1946, which held that a circuit court of appeals should pass upon nonconstitutional questions first in order to avoid dealing with constitutional issues unless absolutely essential to the disposition of the case, would seem even more clearly to require the courts to refrain from acting while the controversy is in the course of administrative determination. The undesirability of deciding a constitutional issue when the case may not call for it is supplemented by the recognized rule against unnecessary and premature judicial intervention in the administrative process.

It cannot be said that the Tax Court is unable to pass upon questions of constitutional stature. It does so in the tax field,[18] and there is no stat-

[18] *Independent Life Ins. Co. of America* v. *Commissioner of Internal Revenue*, 17 B. T. A. 757, affirmed, 67 F. 2d 470

utory impediment in the Renegotiation Act to its giving consideration to constitutional questions along with others.[19] Nor is there reason to doubt that it will be as independent in handling renegotiation cases as in tax cases. Though perhaps not technically classified as a judicial agency, the Tax Court has been declared by this Court to be a forum which "has established a tradition of freedom from bias and pressures," whose "procedures assure fair hearings," and whose "deliberations are evidenced by careful opinions". *Dobson* v. *Commissioner*, 320 U. S. 489, 498. And, as the Tax Court has itself recognized in *Stein Bros. Mfg. Co.* v. *Secretary of War*, 7 T. C. 863, 882, at least on constitutional questions there can be no doubt that its decisions would be subject to review by a judicial tribunal and ultimately by this Court.

(C. C. A. 6), reversed, 292 U. S. 371; *Keusch* v. *Commissioner of Internal Revenue*, 23 B. T. A. 216, appeal dismissed, 60 F. 2d 481 (C. C. A. 3), certiorari denied, 287 U. S. 641; *General Securities Corporation* v. *Commissioner of Internal Revenue*, 23 B. T. A. 130; *General Aniline & Film Corporation* v. *Commissioner of Internal Revenue*, 3 T. C. 1070; *Mertens on Income Taxation*, § 50.19.

[19] On September 26, 1946, the Tax Court passed upon and sustained the constitutionality of the Renegotiation Act. *Stein Bros. Mfg. Co.* v. *Secretary of War*, 7 T. C. 863, 876–882, relying on *Spaulding* v. *Douglas Aircraft Co.*, 154 F. 2d 419 (C. C. A. 9). This does not render it unnecessary for appellant to follow the statutory procedure. *Gilchrist* v. *Interborough Co.*, 279 U. S. 159, 207–209; *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, 616–617. A person in the same position as the losing party in an identical case may not institute his case in the circuit court of appeals because it would come before the same district judge.

The reasoning to this effect of another three-judge district court in the District of Columbia in disposing of a case substantially identical to this one is quoted in the margin.[20]

In *Arrow Distilleries* v. *Alexander*, 24 F. Supp. 880, 882 (D. D. C.), affirmed on other grounds, 306 U. S. 615, a three-judge district court stated that although the National Labor Relations Act had been held constitutional prior to *Myers* v. *Bethlehem Shipbuilding Corp.*, "the rule applies even though the question of constitutionality is undecided".

There have been circumstances in which, because the effect of the statute itself was to cause

[20] See *Knowles* v. *Hirsch*, 65 F. Supp. 690, 691 (D. D. C.): "The plaintiff's plea of the statute's unconstitutionality is prematurely presented here, as it should be urged first in the Tax Court. That court, in tax cases, has passed upon constitutional questions heretofore, and its decisions concerning them have been appealed and the appeals so taken have been considered by the courts. While the Renegotiation Act provides that when the Tax Court has redetermined the amount of excessive profits there shall be no judicial review of its determination, it does not follow that a Tax Court decision concerning the constitutionality of the Act may not be reviewed by the courts. Since the Tax Court is an agency in the executive branch of the government, it does not have, and could not be given, final or exclusive jurisdiction to determine constitutional questions. The power to pass on the constitutionality of an act of the Congress is a prerogative of the judicial branch of the government. Constitutional questions under the Renegotiation Act are, in the first instance, part of the case before the Tax Court, but, as with questions of jurisdiction, the decisions of that court concerning them are appealable. Consequently, the plaintiff in the case at bar must first present his constitutional question to the Tax Court if he desires to obtain an adjudication concerning it."

irreparable injury irrespective of the outcome of the administrative process, this Court has passed upon the constitutionality of a law without requiring the use of administrative procedures. *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 592–595; *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 287; *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 386. It is to be noted that those cases involved only a question of equity jurisdiction, and not a statute in itself specifically giving the administrative agency exclusive jurisdiction, as is the case here. But, in any event, that exceptional treatment has not been applied where the injury consisted of the financial inconvenience of payment in advance and an action for refund. If that were not the case, a taxpayer would be able to circumvent the established system for collecting taxes in advance of a determination of legality whenever it was difficult for the taxpayer to do without the sum paid during the period of litigation. In *Cottman Co.* v. *Dailey*, 94 F. 2d 85 (C. C. A. 4), certiorari denied, 299 U. S. 566, an attempt was made to enjoin collection of a customs duty on the ground, *inter alia*, that the Antidumping Act was unconstitutional because of an invalid delegation of legislative power. The opinion of Judge Parker stated that where duties may be paid under protest and then recovered "the remedy provided by Congress is adequate even though the duties assessed be illegal or unconstitutional.

The mere fact that the act of Congress is alleged to be unconstitutional * * * does not present a case for equitable interference where such legal remedy is provided." (94 F. 2d at 89.)

8. *Act not unconstitutional in toto.*—In any event, no extended argument is necessary to show that the Renegotiation Act is not invalid *in toto.* The standard of "excessive profits", even apart from the enumeration of factors to be considered contained in Section 403 (a) (4) (A),[21] furnishes a guide to administrative action at least as specific as "public interest" (*New York Central Securities Corp.* v. *United States,* 287 U. S. 12, 24; *United States* v. *Chemical Foundation,* 272 U. S. 1; *Avent* v. *United States,* 266 U. S. 127; *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 225–226), "unreasonable obstruction to navigation" (*Union Bridge Co.* v. *United States,* 204 U. S. 364), "just and reasonable" for rate-making purposes (*Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420; cf. Interstate Commerce Act,

[21] The first renegotiation statute of April 28, 1942 (Appendix, p. 1) contained no definition of excessive profits, although by the time the statute was amended in October 1942 (Appendix, p. 5), Congress had been apprised of the standards which the War Department was applying in interpreting the phrase. The Renegotiation Act of 1943 contained a detailed statement of the factors to be taken into consideration in determining what profits were "excessive." (Appendix, pp. 19–20.) The 1943 Act applies to fiscal years ending after June 30, 1943 (Sec. 403 (c) (6), Appendix, p. 33), and thus governs the renegotiation involved in this case. See pp. 7–8, *supra.*

Section 15, 49 U. S. C. 15), and "primarily" or substantially (*Federal Reserve Board* v. *Agnew*, No. 66, Oct. Term, 1946, decided January 6, 1947, slip sheet, p. 7)[22]. In *Yakus* v. *United States*, 321 U. S. 414, 425, the Court stated: "It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework." See also *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 145; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 398; *Spaulding* v. *Douglas Aircraft Co.*, 154 F. 2d 419, 423–426 (C. C. A. 9); *Stein Bros. Mfg. Co.* v. *Secretary of War*, 7 T. C. at 880–881.[23] Nor can there be any doubt that the Rene-

[22] The cases on which appellant apparently relies (Br., pp. 43–51) are not concerned with delegation of legislative power but with the definiteness of statutory language, unimplemented by any administrative action, as a standard for unlawful conduct.

[23] The *Spaulding* case, which upheld the Renegotiation Act itself, noted that "excessive profits" are determined by first ascertaining the standard of "reasonable profits", and deducting this from the total profit, and that the "reasonable profit" is not substantially different from the standard of "reasonable rates" used in the Interstate Commerce Act and other statutes. The *Spaulding* opinion also notes that the attention of Congress had been called to the means by which the general standard had been implemented by the War Department, so that the subsequent amendment of the statute was in effect a ratification of the standards being administratively applied (154 F. 2d at 423–425). Compare *Hirabayashi* v. *United States*, 320 U. S. 81, 91.

gotiation Act is an appropriate exercise of the war power in order to prevent undue war profiteering at the expense of the nation and thereby reduce the cost of the war. See *Spaulding* v. *Douglas Aircraft Co., supra,* 422–423, and cases cited; *United States* v. *Alexander Wool Combing Co.,* 66 F. Supp. 389 (D. Mass.); *Stein Bros. Mfg. Co.* v. *Secretary of War, supra,* at 877–878.

Appellant's constitutional objections to the absence of judicial review of Tax Court decisions, and to the lack of trial by jury, could not, even if meritorious, invalidate the entire statute. If judicial review should be found constitutionally necessary, the clause making determinations of the Tax Court not subject to review "by any court", (Section 403 (e) (1)) would alone be invalid, and a proper judicial remedy created. *Stein Bros. Mfg. Co.* v. *Secretary of War,* 7 T. C. at 882. Congress obviously would not have intended the entire statute to fall, thereby leaving contractors with their excessive profits, merely because of the necessity of permitting judicial review. The separability clause (Section 403 (g)) in itself manifests the congressional intention as to this. Cf. *Electric Bond and Share Co.* v. *Securities and Exchange Commission,* 303 U. S. 419, 434. Even more clearly, appellant's contentions as to the unconstitutionality of the statute when retroactively applied would not make the law entirely void; there would be ample room for

its prospective operation. Such a contention relates only to the validity of an application of the statute in a particular case, and is clearly not sufficient to avoid the doctrine that administrative remedies must be exhausted. Cf. *Macauley* v. *Waterman Steamship Corp., supra; Myers* v. *Bethlehem Shipbuilding Corp., supra.*

II

APPELLANT HAS AN ADEQUATE REMEDY AT LAW

In granting appellees' motions to dismiss the amended and supplemental complaint and for summary judgment, the court below held not only that the suit was premature but also that equity had no jurisdiction. The court below stated (R. 434) that "equity has no jurisdiction for the reason that the plaintiff has complete remedies by actions at law. It claims that certain parties are indebted to it by reason of certain contracts; the payment of these claims under a judgment at law would give a full, adequate and complete remedy." This holding, we submit, is clearly correct.

Appellant contends that, contrary to the holding of the court below, it would not have an adequate remedy at law by a suit against contractors to whom withholding orders had been issued, as its debtors are too numerous. In its brief (p. 114), appellant states it "would be required to sue sixteen or more of its customers." But this Court has held that the district courts have "no

power" to "grant the injunction sought," notwithstanding the possibility that the contractor "would be subjected to a multiplicity of suits in order to recover the money due on the contracts." *Macauley* v. *Waterman Steamship Corp.*, 327 U. S. 540, 544, 545. Furthermore, the record does not support appellant's contention that withholding orders would be issued to sixteen or more of its customers, all of whom it would have to sue. As is shown by the affidavit of Maurice Hirsch (R. 117–118), the collection method to be adopted in this case will be the issuance of withholding orders to "two or possibly three" contractors doing business with the United States who owe various sums of money to the appellant. The affidavit also states that if this method of collection does not result in a discharge of the claim, a recommendation will be made to the Attorney General that suit be brought by the United States against appellant to compel payment of the claim (*ibid.*).

If withholding orders are issued to "two or possibly three" prime contractors, the appellant would have an adequate remedy at law in that he could bring action against one or more of such contractors to require the payment of whatever sums it believed to be owing. The contractor could set up by way of defense the withholding order which would afford adequate opportunity for a determination of the constitutionality of the Renegotiation Act, pursuant to the provisions of

which the withholding orders were issued. That such a suit would afford appellant an adequate remedy at law is fully sustained by the case of *Spaulding* v. *Douglas Aircraft Co.*, 154 F. 2d 419 (C. C. A. 9), decided March 13, 1946), in which such a suit was brought. The *Spaulding* case demonstrates not only that a subcontractor can sue his prime contractor and thereby obtain a forum for the consideration of all appropriate questions, but also that a single suit against any one prime contractor is sufficient to protect the subcontractor's rights. In such a suit a judgment may be sought declaring the Renegotiation Act, or a part thereof, to be unconstitutional. The United States can then intervene to present evidence and argument concerning the constitutionality of the statute and to defend the action taken by the renegotiating officials. If it were finally adjudged that the withholding for the account of the United States of the amount determined to have been excessive profits was unlawful and erroneous, that adjudication would no doubt support a refund under the Third Deficiency Appropriation Act, 1946, Public Law 521, 79th Cong., 2d Sess., approved July 23, 1946.

The availability of a comparable action in a suit at law on the contract prevents the assumption of jurisdiction by a court of equity. *Coffman* v. *Breeze Corporations*, 323 U. S. 316. This Court, in affirming the dismissal by a statu-

tory three-judge district court of the complaint in an injunction suit by a patent owner against his licensees, challenging the constitutionality of the Royalty Adjustment Act, stated (p. 322):

> Appellant does not in the present suit bring to our attention any facts showing or tending to show that a suit to recover a money judgment for the royalties would not afford complete and adequate relief without resort to an equitable remedy. In such a suit if appellee Breeze is obligated by the contracts in question to pay the royalties to appellant, it can discharge that obligation only by payment of the amount due, or by setting up the Royalty Adjustment Act as a defense. Compliance with the duty under the Act to pay into the Treasury the royalties withheld from appellant would operate by the terms of the Act as a discharge of the obligation to pay appellant. If that defense were offered, the constitutional validity of these provisions of the Act would be a justiciable issue in the case, since upon its adjudication would depend appellant's right of recovery.

It is the policy of the United States to intervene in any suit brought against a contractor who has been ordered to withhold amounts otherwise due a subcontractor. Since the Renegotiation Act provides (Section 403 (c) (2), Appendix p. 30) that "each contractor * * * is hereby indemnified by the United States against all

claims by any subcontractor on account of amounts withheld from such subcontractor pursuant to this paragraph", the United States would have the primary burden of defending the action, since it would be immaterial to the contractor who won the suit.

Appellant's brief refers repeatedly to the disastrous consequences to its business if it were forced to sue its customers to recover the amounts withheld. Inasmuch as such suits would undoubtedly be defended by the Government (as in *Spaulding* v. *Douglas Aircraft Co.*, 154 F. 2d 419 (C. C. A. 9)), which would be bound to reimburse the customer if appellant prevailed (Section 403 (c) (2)), and since the customer would realize that the suit was aimed at the Government and not at him, it may be doubted whether he would discontinue business relations because appellant made him the nominal defendant. But in any event appellant could avoid such consequences by paying the sums claimed to the Government directly. The sum would then be recovered if appellant prevailed in the Tax Court or elsewhere without the necessity of suits against customers.

It is submitted that there is no issue concerning the constitutionality of the Renegotiation Act or any of its provisions or their interpretation which cannot be raised in a single suit by a subcontractor against a contractor to whom a withholding order has been issued. The United

States would be legally bound by the ruling of such court on any issue raised and would be estopped from pursuing collaterally any action, administrative or in the courts, in contravention of the decision in that action. The United States, having once litigated any question with the appellant, would be precluded from litigating that question again. See *United States* v. *Moser*, 266 U. S. 236, 242; *Fishgold* v. *Sullivan Drydock & Repair Corp.*, No. 970, Oct. Term, 1945; Scott, *Collateral Estoppel by Judgment* (1942), 56 Harv. L. Rev. 1.

Furthermore, if the Government brought a suit against appellant to collect sums determined to be excessive war profits, appellant would clearly have an adequate remedy at law. *Tilbrook* v. *Forrestal*, 65 F. Supp. 1 (D. D. C.); *United States* v. *Alexander Wool Combing Co.*, 66 F. Supp. 389 (D. Mass.); *United States* v. *Pownall*, 65 F. Supp. 147 (S. D. Cal.); cf. *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U. S. 160.

It is settled that the availability at law of a plain, adequate and complete remedy is fatal to the right to injunctive relief in any Federal court. *Hurley* v. *Kincaid*, 285 U. S. 95, 105; *Schoenthal* v. *Irving Trust Co.*, 287 U. S. 92, 94; *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491, 497; *Boise Artesian Water Co.* v. *Boise City*, 213 U. S. 276, 283. The issue raised in the complaint below as to the constitutionality of the Act does not affect these principles. "The fact that it would be convenient for the parties and the public to have

promptly decided whether the legislation is valid, cannot justify a departure from * * * established principles of equity practice" (Brandeis, J., concurring in *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 345); see also *Arkansas Building Association* v. *Madden*, 175 U. S. 269, 274.

III

THIS IS A SUIT AGAINST THE UNITED STATES TO WHICH THE UNITED STATES HAS NOT CONSENTED

The defendants-appellees in this suit are the members of the War Contracts Price Adjustment Board, the Secretary of War and the Under Secretary of War. The amended and supplemental complaint seeks, among other things, "injunctive relief restraining the defendants and each of them from further proceeding under the Renegotiation Act" (R. 133).

Appellant's suit, it is to be assumed, is based implicitly upon the assumption that the United States, in whose name the conduct complained of is being carried out, is as a matter of law not so directly involved as to deprive the court of jurisdiction.[24] The theory must be that the appellees,

[24] Actually, appellant is laboring under no such misconception, and in its amended and supplemental complaint, paragraph 17 (9), explicitly recognized that this is a suit against the United States when it stated (R. 146):

"The Renegotiation Act violates Article III, Section 1 and Section 2 of the Constitution of the United States in that it authorizes the Executive branch of the Government of the United States to determine a controversy to which the United States is a party."

by virtue of exceeding their statutory authority, are acting or about to act as trespassers in the sense of violating some legally protected right of appellant, and that the overstepping of the statutory bounds strips the cloak of official authority from the appellees so that they act wrongfully as individuals rather than as agents of the Government. Cf. *Ex Parte Young*, 209 U. S. 123; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605.

The sovereign immunity extends to suits "against its officers, agents, and representatives, where the [sovereign], though not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates." *In re Ayers*, 123 U. S. 443, 506; *Belknap* v. *Schild*, 161 U. S. 10, 25; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387. In *Louisiana* v. *McAdoo*, 234 U. S. 627, 632, the Court, in speaking of suits to review the official action of the Secretary of the Treasury as to the rate which should be exacted under his construction of the Tariff Acts, observed that such suits "would operate to disturb the whole revenue system of the Government and affect the revenues which arise therefrom. Such suits would obviously, in effect, be suits against the United States."[25] We submit that the suit below was one against the

[25] Cf. *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292, 296; *Hagood* v. *Southern*, 117 U. S. 52, 69; *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446, 457.

United States, since a judgment rendered for the appellant would have a substantial impact upon the financial affairs of the sovereign.

This Court has recently applied the sovereign immunity doctrine in a suit against the Secretary of the Navy to enjoin one aspect of the renegotiation process. *Mine Safety Appliances Co. v. Forrestal*, 326 U. S. 371. There the renegotiation order had been issued, and the Secretary of the Navy sought to enforce it by withholding amounts otherwise due the contractor from the Government. A suit in the district court to enjoin such withholding was held barred as a suit against the United States because the effect of the relief sought would be to compel the payment of money from the federal treasury.

As is shown in the affidavit of Maurice Hirsch (R. 117–118), the Government intends to eliminate the excessive profits determined to have been realized by appellant, by issuing withholding orders to two or possibly three contractors who owe money to appellant. If this method of collection does not result in a discharge of the claim a suit will probably be brought by the Government against the appellant to compel payment of the claim. Both of these methods of collection are authorized by the Renegotiation Act (Sec. 403 (c) (2), Appendix, pp. 29–30), and it would seem that appellant requests that appellees be enjoined from proceeding in any of such ways to collect

the claim. That the United States is clearly a necessary party to this action is well illustrated by the fact that any suit brought against appellant to collect excessive profits would be brought in the name of the United States. Furthermore, any contractor who was directed to withhold sums owing to appellant would by the terms of the Renegotiation Act withhold such sums "for the account of the United States." Any such contractor withholding such sums is "indemnified by the United States against all claims by any subcontractor on account of amounts withheld from such subcontractor." All such monies recovered shall be covered into the Treasury as miscellaneous receipts. If the excessive profits determined to have been realized by the appellant had already been collected by one of the methods provided in the Renegotiation Act, then the *Mine Safety Appliances Company* case would be on all fours with the instant one. In this case judicial relief is sought at an earlier stage in the same type of proceeding. The same principle which would bar a United States district court from assuming jurisdiction where the alleged injury had actually occurred would, it would seem, similarly stand in the way of jurisdiction where the alleged injury was only threatened.

Nor is there any principle of law which restricts the sovereign immunity, where the suit is nominally against the Government office to cases where the relief sought would involve pay-

ment from the Government Treasury. Thus, in *Belknap* v. *Schild*, 161 U. S. 10, the effect of the injunction sought against the official (to prevent patent infringement) would have been to stop the Government's manufacture of an article needed by the Navy. Likewise, in *In re Ayers*, 123 U. S. 443, the injunction would have prevented State attorneys from bringing certain suits for the collection of State taxes. Again, in *Louisiana* v. *McAdoo*, 234 U. S. 627, equitable relief would have prevented the Secretary of the Treasury from collecting less than the alleged legal tariff.

It is submitted that this suit should have been dismissed, among other grounds, for the reason that it was a suit against the United States to which Congress had not consented. Congress has consented to suit in the Tax Court concerning questions arising under the Renegotiation Act, and, where constitutionally necessary, thereafter in other courts. Congress has not consented, however, to initial review of such questions by suit for a declaratory judgment and injunctive relief in the district courts. On the contrary, Congress has carefully sought to bar such jurisdiction by giving the Tax Court exclusive jurisdiction of such questions. Cf. *Ford Motor Company* v. *Department of Treasury*, 323 U. S. 459. The same principle which required dismissal of the suit in *Mine Safety Appliances Co.* v. *Forrestal*, 326 U. S. 371, requires a dismissal of the instant proceeding.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES

No. 95.—October Term, 1946.

Aircraft & Diesel Equipment Corporation, Appellant, *v.* Maurice Hirsch, E. D. McDougal, John R. Paul, et al.	Appeal From the District Court of the United States for the District of Columbia.

[June 16, 1947.]

Mr. Justice Rutledge delivered the opinion of the Court.

This case is the fourth in a series seeking here a determination of the invalidity, on constitutional grounds, of the First and Second Renegotiation Acts[1] and allied legislation.

In *Coffman* v. *Breeze Corporations*, 323 U. S. 316, and in *Alma Motor Co.* v. *Timken-Detroit Axle Co.*, 330 U. S. —, the Royalty Adjustment Act[2] was attacked. The *Alma Motor* case was remanded to the Circuit Court of Appeals for a determination of the Act's applicability. The suit in the *Coffman* case was by a patent owner to restrain his licensees from paying accrued royalties to the Government pursuant to the Act's provisions. We held that the complaint had been rightly dismissed for want of equity jurisdiction, since the plaintiff had an adequate remedy at law by suit against its licensees, and also for want of a justiciable case or controversy.

In *Mine Safety Co.* v. *Forrestal*, 326 U. S. 371, a government contractor challenged the Renegotiation Acts.[3] The complaint sought to enjoin the Secretary

[1] The First Renegotiation Act was contained in § 403 of the Sixth Supplemental National Defense Appropriation Act, 56 Stat. 226, as amended, 56 Stat. 798, 982; 57 Stat. 347, 57 Stat. 564. The Second Renegotiation Act appears in the 1943 Revenue Act, 58 Stat. 21, 78, as amended 59 Stat. 294.

[2] Of October 31, 1942, 56 Stat. 1013, 35 U. S. C. §§ 89–96.

[3] See note 1.

of the Navy from taking action "which would stop payment by the Government of money lawfully in the United States Treasury to satisfy the government's and not the Secretary's debt to the appellant." 326 U. S. at 374. Accordingly we held that the Government was an indispensable party. Since it neither had been joined in the suit nor had consented to be sued in such a proceeding, it followed that the complaint had been properly dismissed.

In one other case, *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540, constitutionality was not involved, but coverage of the Renegotiation Acts was put in issue. The suit was brought in a District Court for a declaratory judgment and to restrain further renegotiation proceedings affecting the specified contracts. The contractor had not sought a decision on coverage from the Tax Court. We held that the Tax Court has power to decide such questions in the proceedings authorized by § 403 (e) (1) of the Second Renegotiation Act. Hence, under the authority of *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, the complaint in the *Waterman* case also was held rightly to have been dismissed, in this instance for the plaintiff's failure to exhaust its administrative remedy.

Now the Aircraft & Diesel Equipment Corporation seeks a declaratory judgment that the First and Second Renegotiation Acts are unconstitutional on various grounds. Injunctive relief also is asked. And, in addition to the constitutional questions, determination is sought of issues of coverage and other matters.

The defendants, appellees here, consist of the members of the War Contracts Price Adjustment Board, the Secretary of War, and the Under Secretary of War.[4] Pur-

[4] The War Contracts Price Adjustment Board is created by § 403 (d) (1) of the Second Renegotiation Act, 50 U. S. C. App. § 1191 (d) (1). The present appellees were substituted by an order of the District Court as successors in office of the original defendants.

suant to the statutory requirement, 50 Stat. 751, 752, 28 U. S. C. § 380 (a), a district court of three judges was especially convened. After hearing, the complaint was dismissed.[5] One ground for this action was that the suit is premature, since proceedings were pending and undetermined in the Tax Court, pursuant to appellant's applications, for redetermination of its allegedly excessive profits for 1942 and 1943.[6] The court also held that it was without jurisdiction in equity, since in its view adequate remedy at law was available to Aircraft. Probable jurisdiction of the appeal was duly noted here.[7] 329 U. S. —.

We think the District Court correctly dismissed the complaint, and for the reasons stated as grounding its action. The issues expansively include almost all comprehended in the causes previously determined here. But the case reaches this Court in a posture differing in some substantial respects from that characterizing any of those proceedings. Hence it becomes necessary to set forth with some particularity the facts and controlling issues.

I.

Appellant is in the business of manufacturing diesel fuel injection equipment and precision parts, and aircraft precision parts. Its manufacturing activities, insofar as material,[8] were carried on under subcontracts with gov-

[5] 62 F. Supp. 520.

[6] See note 9. The Tax Court proceedings remain pending and undetermined at the date of this decision, although we are informed that the causes have been argued and submitted for decision.

[7] On appellant's application the District Court enjoined the defendants, pending determination of the appeal, from taking further action to enforce the statutes, particularly by notifying or requiring appellant's customers to pay into the Treasury of the United States moneys alleged to be due Aircraft under contract provisions, but claimed by appellees to be payable to the Government as excessive profits pursuant to the Acts' terms. Cf. notes 10, 13 *infra*.

[8] The amended complaint alleges that appellant supplied materials to the Department of the Navy under one contract made directly

ernment contractors. The contractor in turn furnished the completed aircraft or engines to the United States.

Pursuant to the First Renegotiation Act, the Secretary of War, acting through his delegate the Under Secretary of War, determined on October 27, 1943, that during the fiscal year ended November 30, 1942, appellant had realized excessive profits (less tax credits) amounting to $204,000. On April 29, 1944, the Under Secretary directed appellant's customers to withhold this sum from appellant. Thereafter it filed a petition with the Tax Court[9] for a redetermination of the alleged excessive profits. Nevertheless, on July 19, 1944, the Under Secretary further directed appellant's customers to pay the $204,000 into the Treasury of the United States, and this direction was obeyed.[10]

Following the fiscal year ended November 30, 1943, renegotiation proceedings were instituted under the Second Renegotiation Act. On January 11, 1945, the Under

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between it and the Government. But it is also alleged that appellant has been paid in full for these supplies. Apparently, therefore, the contract and the relation which it created between appellant and the Government have no bearing upon the issues in this cause.

[9] The First Renegotiation Act did not provide for redetermination by the Tax Court as originally enacted; nor did it specifically provide for review, by any body, of the determination of excessive profits. See Steadman, A Further Legal Inquiry Into Renegotiation: 1 (1944) 43 Mich. L. Rev. 1, 12. But Tax Court redetermination was afforded by the Second Renegotiation Act and was made retroactive. 50 U. S. C. App. § 1191 (e) (2) provides that it is available to "Any contractor or subcontractor . . . aggrieved by a determination of the Secretary made prior to the date of enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excessive profits."

[10] The original Act, as amended, provided: "Upon renegotiation the Secretary is authorized and directed to eliminate any excessive profits under such contract or subcontract . . . (iii) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to the subcontractor, any amount of such excessive profits under the subcontract. . . ." 56 Stat. at 983. See also note 13.

Secretary of War, as delegate of the War Contracts Price Adjustment Board, entered an order determining that appellant had realized excessive profits of $1,265,000. Deduction of tax credits reduced this amount to approximately $270,000. Appellant again filed a petition for redetermination with the Tax Court.[11] Then followed this suit.

The amended complaint is too lengthy for detailed summarization in this opinion. Apart from allegations going to constitutionality and coverage, including asserted defects in the renegotiation procedures followed,[12] the complaint sought to establish jurisdiction in the District Court, equitable in character, by showing the inadequacy of all available legal or other remedies. These included the pending Tax Court proceedings, possible suit in the Court of Claims following completion of the Tax Court's determination, and actions at law against appellant's customers, contractors with the Government, to recover the amounts said to be due under their various contracts.

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[11] An earlier petition was dismissed on motion of the United States because it was filed during the time when the War Contracts Price Adjustment Board might have initiated a review. Cf. *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540. After dismissal of the earlier petition and before filing of the later one, appellant had sought redetermination, pursuant to § 403 (e) (1) of the Second Renegotiation Act, by the War Contracts Price Adjustment Board. The Board denied review and adopted the Under Secretary's redetermination as its own.

[12] For example, in addition to contentions that the Renegotiation Acts as a matter of substantive law violate Article I, § 1, of the Constitution in that they constitute unlawful delegations of legislative power as well as contravene the due process and just compensation provisions of the Fifth Amendment, the jury trial provision of the Seventh Amendment, and the Tenth Amendment, it is said that the order under the Second Renegotiation Act was based in part at least on information said to have been obtained from "governmental and other reliable sources" which the appellant has had no opportunity to examine or rebut.

In particular it was alleged that, notwithstanding the pendency of the Tax Court proceedings, the Board and the Secretary, or his delegates, were taking steps to prevent Aircraft's customers from paying over to it moneys owing on contracts, aggregating $270,000, and claimed to be due the Government as excessive profits. The complaint alleged further that the Board and the Secretary were threatening to direct Aircraft's customers to pay these sums into the Treasury [13] and that, unless they were restrained, such payment would be made, to appellant's irreparable injury.[14] No direct relief was asked, by way

[13] Section 403 (c) (2) of the Second Renegotiation Act, 50 U. S. C. App. § 1191 (c) (2), provides: "Upon the making of an agreement, or the entry of an order, under paragraph (1) by the Board, or the entry of an order under subsection (c) by The Tax Court of the United States, determining excessive profits, the Board shall forthwith authorize and direct the Secretaries or any of them to eliminate such excessive profits (A) by reduction in the amounts otherwise payable to the contractor under contracts with the Departments, or by other revision of their terms; or (B) by withholding from amounts otherwise due to the contractor any amount of such excessive profits; or (C) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to a subcontractor, any amount of such excessive profits of such subcontractor; or (D) by recovery from the contractor, through repayment, credit, or suit any amount of such excessive profits actually paid to him; or (E) by any combination of these methods, as is deemed desirable. . . ."

[14] The allegations included the following: "Notwithstanding the fact that the plaintiff has filed its petition for redetermination in The Tax Court of the United States whereby it seeks an orderly determination of the amount, if any, it may owe to the United States of America, as excessive profits for its fiscal year ending November 30, 1943, the War Contracts Price Adjustment Board, purporting to act under the provisions of Section 403 (c) (2) of the Renegotiation Act, purposes to direct the defendant Henry L. Stimson, Secretary of War, or his delegates, to direct contractors, customers of the plaintiff, to withhold moneys due to the plaintiff by such contractors for the account of the United States, in amounts determined by it, the War Contracts Price Adjustment Board, to be due as excessive profits, and Henry L. Stimson, Secretary of War, or his delegates

of judgment or decree, for refund of the $204,000 collected by the Government from appellant's customers, pursuant to the First Renegotiation Act, as excessive profits realized in 1942. It was suggested, however, that if that Act should be found invalid and the Second Act sustained,[15] the Government should be permitted to collect only the difference between $270,000, the amount determined to be excessive profits for 1943, and the $204,000 collected for 1942. The suggestion, of course, if formally made, would be substantially a claim against the Government by way of setoff of the latter amount. Cf. *Mine Safety Co.* v. *Forrestal, supra.*

The Government has contested each of appellant's claims. But its primary contentions have been aimed at Aircraft's jurisdictional showing. It argues that the suit in substance and legal effect is one against the United States, to which there has been no governmental consent, cf. *Mine Safety Co.* v. *Forrestal, supra;* that the suit is premature, because the Tax Court proceedings have not been completed and until this has been done Aircraft will not have exhausted its administrative remedy, cf. *Macauley* v. *Waterman S. S. Corp., supra;* that the Tax Court has been given exclusive jurisdiction in renegotia-

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purposes to follow such directions of the War Contracts Price Adjustment Board and further to direct such contractors to pay such sums of money into the Treasury of the United States, in accordance with the procedure adopted by Henry L. Stimson, Secretary of War, acting through his delegate, Robert P. Patterson, in respect of excessive profits found by him to be due for the fiscal year of the plaintiff ending November 30, 1942, as heretofore, recited in this complaint, before The Tax Court of the United States of America shall have made or shall have had opportunity to make any determination of the plaintiff's petition for a redetermination of its excessive profits, if any, for its fiscal year ending 1943." See also note 42.

[15] The omission from the First Act of various provisions contained in the Second, see note 9 *supra*, is alleged to afford basis for invalidating the former even though the latter may be held constitutional.

tion matters; and that, in any event, there is no jurisdiction of an equitable character in the District Court, to afford the relief appellant seeks, since it has an adequate remedy at law by suit upon its contracts to recover any amounts due from its customers, in which all questions of constitutionality may be determined. Cf. *Coffman* v. *Breeze Corporations, supra.*

In the latter connection appellee Hirsch, as chairman of the Board, has filed an affidavit admitting that he and the other appellees, unless restrained, will take steps, as appellant alleges, to prevent payment of the $270,000 by its customers to it, and also to secure payment of that sum into the Treasury. The affidavit sets forth, however, that direction for payment will not be required or made as to more than two or three of appellant's customers and, in the event this does not result in payment of the full amount, the Government will proceed to collect whatever may remain by suit against appellant.

Aircraft, on the other hand, both in the amended complaint and by the supporting affidavit of its president, alleged that no such sum as $270,000 was owing to it from, or could be collected by direction to, any two or three of its customers. Rather it was set forth that collection of any such amount could be made only by direction to some sixteen or more customers. And on the same basis it is asserted that Aircraft's remedy by suit against its customers would require institution of numerous actions in different jurisdictions, resulting in expense and delay, as well as loss of good will and incurring the continued risk of the customers' solvency.[16] Accordingly Aircraft claims that jurisdiction in equity is conferred upon the District Court both by reason of the multiplicity of suits involved in asserting the legal remedy by actions against its customers and because of the injurious consequences which would follow from pursuing that course.

[16] See note 42 *infra.*

II.

We do not find it necessary to undertake determining the threshold question whether the suit is one against the United States. Were the issue squarely presented as a formal claim for refund or setoff concerning the $204,000 collected by the Government for 1942, the case in that aspect would be very close to *Mine Safety Co.* v. *Forrestal, supra.*[17]

We do not tarry, however, to consider further this feature of the case, since the absence of formal and specific claim in the nature of setoff or otherwise indicates, we think, a strategic decision to avoid the difficulties which would follow upon its definite and unequivocal assertion, on the score of the nature of the suit as being one in fact and function against the Government. Something more than a mere suggestion of claim or relief is required to bring into play judicial power of affording remedy, especially when it appears there may be good reason deliberately accepted for going no farther. This is reinforced when the suggestion, if acted on, would involve the Court in decision of serious constitutional questions. They are not to be entertained upon dubious presentations or, most certainly, when the presentation reasonably may be taken as not intended to put them forward squarely and inescapably. Cf. *Rescue Army* v. *Municipal Court*, 331 U. S. —; *Alma Motor Co.* v. *Timken-Detroit Axle Co.*, 330 U. S. —. Accordingly we put to one side the lengthy

[17] Although asserted by way of equitable setoff, the effect of allowing such a claim would be, as we said in the *Mine Safety* case, to prevent the Secretary from taking certain action which, though it would not "stop payment by the government of money lawfully in the United States Treasury to satisfy the government's and not the Secretary's debt to the appellant," nevertheless would amount to "an indirect effort to collect a debt allegedly owed by the government in a proceeding to which the government has not consented," 326 U. S. 374, 375, and to which, as in that case, it has not been made formally a party.

allegations concerning the 1942 determination, and confine our consideration to the issues relating to the redetermination made for the fiscal year of 1943.

These also, the Government urges, substantially are effective to make the suit one against the Government, to which it has not consented. And for this view, likewise, it relies upon the *Mine Safety* decision, as well as others.[18] Appellant undertakes to distinguish the cases upon the basis that in the *Mine Safety* case the official action sought to be enjoined was conduct effective to stop the payment of funds out of the Treasury, whereas here the analogous conduct affects no funds in the Government's actual possession but seeks only to touch moneys held by third persons for appellant's or the Government's account. The difference, it is urged, is between action affecting only the withholding of government moneys and action effective to bring about collection from third persons of moneys claimed to be due to the Government.

That difference indeed may be substantial. But we do not decide whether it is sufficient to enable the appellant to avoid the difficulty presented of foreclosing the Government's claim by a suit brought only against its officials, essentially as trespassers,[19] without joining the Government itself. In other words, we do not determine whether the suit is, in legal effect, one against the Govern-

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[18] Especially *Louisiana* v. *McAdoo*, 234 U. S. 627; *Belknap* v. *Schild*, 161 U. S. 10; *In re Ayers*, 123 U. S. 443.

[19] Appellant's claim is that ordering its customers not only to withhold funds due to it under the contracts but also to pay them into the Treasury would be, in effect, a "trespass upon its property" within the rule of *United States* v. *Lee*, 106 U. S. 196; cf. *Land* v. *Dollar*, 330 U. S. —, and that execution of such orders would deprive it of vested property rights, contrary to various constitutional provisions. Since a decision of the constitutional issues would determine the Government's right to the funds, in any event, the case, like *Land* v. *Dollar*, *supra*, would seem to be one "where the question of jurisdiction [as involving the Government's immunity to suit] is dependent on decision of the merits." 330 U. S. at —.

ment, since in our opinion the other grounds going to the District Court's jurisdiction are adequate to sustain its dismissal of the cause.

Ordinarily of course issues relating to exhaustion of administrative remedies, as a condition precedent to securing judicial relief, and to the existence of jurisdiction in equity are either separate or separable matters, to be treated as entirely or substantially distinct. The one generally speaking is simply a condition to be performed prior to invoking an exercise of jurisdiction by the courts. The other goes to the existence of judicial power in the basic jurisdictional sense. In this case, however, the exhaustion problem and that of equity jurisdiction are closely, indeed inseparably, related. And both are colored by the relevant specific provisions of the Renegotiation Acts, more particularly the Second, since it alone provides for Tax Court redetermination.[20]

In *Macauley v. Waterman S. S. Corp., supra*, we were called upon to consider the relation between the Tax Court proceedings, as provided by § 403 (e) (1), and judicial proceedings instituted in the district or other courts of the United States in regard to renegotiation matters. Section 403 (e) (1) authorizes "any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by" him, to file a petition for redetermination with the Tax Court within ninety days after notice of the order is mailed.[21] The section then provides:

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[20] The provision, however, applies to determinations made prior to the Act's effective date. See note 9 *supra*.

[21] Otherwise the Board's order becomes final. § 403 (c) (1). The provision reads: "In the absence of the filing of a petition with the Tax Court of the United States under the provisions of and within the time limit prescribed in subsection (e) (1), such order shall be final and shall not be reviewed by any court or other agency."

Similarly, a limitation of one year is placed upon "all liabilities of the contractor or subcontractor for excessive profits received or accrued" during each fiscal year. See § 403 (c) (3).

> "Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency."

The section expressly states that the proceeding "shall not be treated as a proceeding to review the determination of the Board,[22] but shall be treated as a proceeding de novo." And the Tax Court is given the same powers and duties, "insofar as applicable," respecting "the contractor, the subcontractor, the Board and the Secretary, and in respect of the attendance of witnesses and the production of papers," together with other procedural matters, as the court has under specified sections of the Internal Revenue Code in redetermining a deficiency in taxes. Moreover, § 403 (e) (1) commands: "The filing of a petition under this subsection shall not operate to stay the execution of the order of the Board under subsection (c) (2)."

In the *Waterman* case, taking account of these provisions, we said: "The legislative history of the Renegotiation Act, moreover, shows that Congress intended the Tax Court to have exclusive jurisdiction to decide questions of fact and law,[23] which latter include the issue raised here of whether the contracts in question are subject to the Act." 327 U. S. at 544. "To grant the injunction sought," the opinion continued, "the District Court would have to decide this issue in the first instance. Whether it ever can do so or not, it cannot now decide questions

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[22] See note 11 *supra*.

[23] Citing, at 90 Cong. Rec. 1355, the statement of a sponsor in the House that the Tax Court could decide "all questions of fact and law. . . ." See also notes 30, 35 *infra*.

of coverage when the administrative agencies [24] authorized to do so have not yet made their determination. Here just as in the *Myers* case, the administrative process, far from being exhausted, had hardly begun. The District Court consequently was correct in holding that it lacked jurisdiction to act." *Ibid.*, 544–545.

The *Waterman* case differed from this one in three respects. There the appellant had "hardly begun" the administrative process, while here Aircraft has done all that it can do. The Waterman Corporation had contracted directly with a government agency, the Maritime Commission. Here the appellant is a subcontractor, a difference of some importance in the matter of jurisdiction in equity later to be noted. The *Waterman* case, as we have said, raised only questions of coverage, not issues of constitutionality. Here both types of question are presented. On the other hand, the cases are substantially identical in the nature of the relief sought. Each complaint asked for a declaratory judgment upon the legal issues and for injunctive relief restraining further action looking toward application of the Act's provisions.

We do not think the differences mentioned are sufficient to distinguish the cases for purposes of applying the exhaustion rule. Certainly no such effect can be derived from the fact that in the *Waterman* case the plaintiff had not begun the administrative process, while here Aircraft has gone as far as it can. The doctrine, wherever applicable, does not require merely the initiation of prescribed administrative procedures. It is one of exhausting them, that is, of pursuing them to their appropriate conclusion and, correlatively, of awaiting their final outcome before seeking judicial intervention.

[24] The Waterman S. S. Corporation not only had failed to file a petition with the Tax Court but also had refused to attend renegotiation conferences with the Board or to supply information sought by it.

The very purpose of providing either an exclusive or an initial and preliminary administrative determination is to secure the administrative judgment either, in the one case, in substitution for judicial decision or, in the other, as foundation for or perchance to make unnecessary later judicial proceedings. Where Congress has clearly commanded that administrative judgment be taken initially or exclusively, the courts have no lawful function to anticipate the administrative decision with their own, whether or not when it has been rendered they may intervene either in presumed accordance with Congress' will or because, for constitutional reasons, its will to exclude them has been exerted in an invalid manner. To do this not only would contravene the will of Congress as a matter of restricting or deferring judicial action. It would nullify the congressional objects in providing the administrative determination. In this case these include securing uniformity of administrative policy and disposition,[25] expertness of judgment, and finality in determination, at least of those things which Congress intended to and could commit to such agencies for final decision.

There can be no doubt whatever, in view of the legislative history, that Congress had each of these ends in view when it provided for the Tax Court proceedings, as well as for action by the Board prior to that stage. Indeed the Board was created in large part to bring under a single aegis the last stage of informal renegotiation before the Tax Court action, in order thus to secure as nearly as possible uniform policy and administration of renegotiation problems.[26] This policy was followed and reinforced

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[25] See note 26 *infra*.

[26] See 89 Cong. Rec. 9928–9929. Previously the governmental departments concerned with renegotiation had set up a central board to effect a "more uniform policy in the determination of excessive profits," H. Rep. 871, 1st Sess., 75, but there was dissatisfaction with the board thus voluntarily established, see 89 Cong. Rec. 9934, and

in the provision for Tax Court redetermination. And that procedure was chosen deliberately in preference to judicial review in the Court of Claims or elsewhere, primarily because of the Tax Court's [27] expertness in fiscal matters analogous to those arising in connection with renegotiation problems,[28] as well as its essentially judicial procedures and experience.[29]

It is equally clear that Congress intended to endow the Tax Court's decisions with a very large degree of finality, as appears from the very terms of § 403 (e) (1), from the whole structure of the Act, and from the legislative history.[30] The express command of § 403 (e) (1) is not simply that the Tax Court shall have "exclusive jurisdiction,

"insistence in Congress that coordination between the departments having renegotiating authority under the prior act be not a matter of voluntary cooperation but one of statutory necessity." Steadman, A Further Legal Inquiry Into Renegotiation: I (1944) 43 Mich. L. Rev. 1, 6.

[27] See 53 Stat. 158, as amended by 56 Stat. 957, 26 U. S. C. § 1100: "The Board of Tax Appeals (hereinafter referred to as the 'Board') shall be continued as an independent agency in the Executive Branch of the Government. The Board shall be known as The Tax Court of the United States and the members thereof shall be known as the presiding judge and the judges of the Tax Court of the United States."

[28] See H. Rep. 871, 78th Cong., 1st Sess., 77; Steadman, A Further Legal Inquiry Into Renegotiation: II (1944) 43 Mich. L. Rev. 235, 270; cf. S. Rep. 627, 78th Cong., 1st Sess., 109; H. Rep. 1079, 78th Cong., 2d Sess., 83.

[29] *Dobson* v. *Commissioner*, 320 U. S. 489, 498; cf. note 27.

[30] "That court will have exclusive jurisdiction, by an order, to make a final determination as to whether excessive profits have been received or accrued, or whether a fair price has been determined, and The Tax Court's determination may not be reviewed or redetermined by any other court or agency." H. Rep. 871, 78th Cong., 1st Sess., 77. See also 89 Cong. Rec. 9930: "The committee has provided that any contractor aggrieved by a determination of excessive profits under the old law, whether he was cooperative and signed a closing agreement or not, may have a review of that determination in the Tax Court of the United States and in the review have all issues, constitutional and otherwise, decided by the court."

by order, to finally determine" the amount of excessive profits, if any. It is also that the determination "shall not be reviewed or redetermined by any court or agency." This is buttressed by the prohibition that filing the petition shall not operate to stay execution of the Board's order under § 403 (c) (2).[31] And not irrelevant to the statute's general policy of finality are the provisions making the Board's determinations final, if the petition for Tax Court redetermination is not filed in the specified time, and those of the Secretary or his delegates final if similar action is not taken to secure redetermination by the Board. § 403 (c) (1).

True, the statute expressly confers rights to follow through the various stages of the procedure to the end of the Tax Court phase. Nevertheless its entire structure indicates the congressional purpose to have matters of renegotiation promptly and expeditiously settled; and to accomplish this as far as possible both by informal negotiations and by introducing the compulsion of finality at every stage unless each succeeding one is taken as commanded.

At the height of the war Congress recognized, as did the procuring agencies,[32] that speed in procurement, and consequently in production of war materials, outweighed all other considerations normally applicable. And while re-

[31] See note 13 *supra*.

[32] The record contains an affidavit made by Robert P. Patterson when Under Secretary of War which reads in part: "Wartime procurement for the military establishment differs radically from procurement in times of peace. Speed in production at once becomes all-important. . . ."

". . . the war procuring agencies cannot use normal methods of procurement. The pressing need for speed requires the abandonment of drawn-out negotiation and the careful surveys of all relevant factors which sound purchasing would otherwise require. Competition necessarily wanes and no longer offers an adequate guide to the prices which should be paid. Above all, the forecasting of costs of production becomes, in large measure, a matter of informed guessing rather than of real cost analysis."

negotiation was a product of that necessity rather than a cause, the problems it raised were time consuming and closely related to pricing difficulties.[33] Often they worked to hinder and delay the process of procurement. Congress theretofore sought, so far as possible, to relieve the interrelated processes from the tedious burden of litigation. It did this by writing the policy of finality into the Act's provisions at each successive procedural stage, although saving the right of resort eventually to the Tax Court to those acting promptly in the prescribed way.

We do not express any opinion, indeed we explicitly reserve decision, upon the question of the finality of Tax Court decisions in these matters. But we cannot infer from a statute so conditioned in background, purpose, terms and compulsion derived from the inevitable circumstances of its application that Congress intended to allow skirting the procedures devised altogether or partially, more particularly in any case where following them could result in no greater loss than the delay and inconvenience which would flow from inability to seek some other remedy not dependent upon their completion.

We are not forced in this case, however, to decide whether Congress intended to give the Tax Court the last word upon all questions of fact and law, or whether it could do so if that were surely its purpose. Nor need we become involved in an attempt to decide what particular questions it might have left, or did leave, for that body's final and conclusive disposition. For it seems obvious, in view of the Act's terms, history, objects and the policies incorporated, that Congress clearly and at the very least intended the Tax Court's functions not only to be put in motion but to be fully performed, before judicial intervention should take place at the instance of one in appellant's position.

[33] The Second Renegotiation Act separated the repricing authority from renegotiation. See 58 Stat. 92, 50 U. S. C. App. § 1192. See also S. Rep. 627, 78th Cong., 1st Sess., 37–38.

This indeed was the ruling of the *Waterman* case. And we do not think the effect of that ruling is exhausted simply because constitutional questions were not raised there, but have been put forward in this cause. Nor is it overcome, in our judgment, by the showing which has been made on this record of irreparable injury and of the need as well as the power of equity to forestall the complete operation of the congressionally prescribed procedure.

On the contrary, whatever may be true of other situations,[34] in this case the very fact that constitutional issues are put forward constitutes a strong reason for not allowing this suit either to anticipate or to take the place of the Tax Court's final performance of its function. When that has been done, it is possible that nothing will be left of appellant's claim, asserted both in that proceeding and in this cause, concerning which it will have basis for complaint.

The Tax Court may decide entirely in appellant's favor. Indeed, if it can sustain there the claims and issues it offers to support here, that possibility is not an unlikely one. For, apart from the questions of constitutionality and of the Tax Court's power to decide them finally or otherwise, appellant has put forward, in both proceedings,[36] claims of exemption and noncoverage relating to contracts involving much larger amounts than the aggregate sums affected by renegotiation, after deduction of tax credits.[37]

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[34] See note 38 *infra*.

[35] See notes 23, 30 *supra*; cf. *Helvering* v. *Independent Life Ins. Co.*, 292 U. S. 371, reversing 67 F. 2d 470, affirming 17 B. T. A. 757; *Stein Bros. Mfg. Co.* v. *Secretary of War*, 7 T. C. 863.

[36] A copy of the petition for redetermination filed in the Tax Court by appellant has been attached as an exhibit to the complaint.

[37] Appellant in its complaint alleged, for example, that although for the fiscal year ending November 30, 1943, its total sales amounting to $3,548,845.50 were renegotiated, "only $2,207,574.95, in any event, were subject to renegotiation; that $1,312,250.07 of its total sales were of 'Standard Commercial Articles' as defined in the Renegotiation

And if those claims are well founded, as to which of course we express no opinion, the Tax Court's determination of these matters of coverage, which we held in the *Waterman* case are initially at least for its disposition, well might render consideration of the constitutional questions by it unnecessary and this cause moot.

Certainly that possible outcome should not be anticipated, either here or by the District Court, through a decision in this case on the constitutional issues. *Rescue Army* v. *Municipal Court*, 331 U. S. —. No more should it be forestalled by decision upon the matters of coverage. *Macauley* v. *Waterman S. S. Corp.*, *supra*.

It is true that the presence of constitutional questions, coupled with a sufficient showing of inadequacy of prescribed administrative relief and of threatened or impending irreparable injury flowing from delay incident to following the prescribed procedure, has been held sufficient to dispense with exhausting the administrative process before instituting judicial intervention.[38] But, without

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Act; were articles sold under competitive conditions affecting the sale thereof in a manner which reasonably protected the Government against excessive prices, and, as such, were not subject to renegotiation; that $29,020.48 of its total sales were not sold for the ultimate use of the United States of America or any department, agency or instrumentality thereof, but were made and sold for civilian use, and, as such, were not subject to renegotiation."

[38] Thus, the Court has permitted resort to a federal court of equity where a state was enforcing confiscatory rates and by its law precluded a stay or supersedeas until the state courts "acting in a legislative capacity" had taken final action. *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290; *Pacific Tel. & Tel. Co.* v. *Kuykendall*, 265 U. S. 196; *Porter* v. *Investors Syndicate*, 286 U. S. 461. For other decisions holding that a federal court may exercise its equitable jurisdiction where there is an inadequate state remedy to correct a constitutional wrong, see *Hillsborough* v. *Cromwell*, 326 U. S. 620; *Wallace* v. *Hines*, 253 U. S. 66.

The rule has been applied most frequently in respect to state rather than federal administrative action, though of course it is not inap-

going into a detailed analysis of the decisions, this rule is not one of mere convenience or ready application. Where the intent of Congress is clear to require administrative determination, either to the exclusion of judicial action or in advance of it, a strong showing is required, both of inadequacy of the prescribed procedure and of impending harm, to permit short-circuiting the administrative process. Congress' commands for judicial restraint in this respect are not lightly to be disregarded.

More especially is this true with legislation of this type, adopted during and to meet the emergency of war and resting, at least in part, upon war powers. For, in such cases, "only if we could say in advance of resort to the statutory procedure that it is incapable of affording due process to petitioners could we conclude that they have shown any legal excuse for their failure to resort to it or that their constitutional rights have been or will be infringed," *Yakus* v. *United States*, 321 U. S. 414, 435, a statement implicitly requiring exhaustion, not merely initiation, of the statutory procedure.

We need not decide in this case, however, whether mere doubt concerning the adequacy of administrative or other relief would be sufficient for allowing anticipation of the administrative determination. For that course is not to be followed if there is another remedy, not inconsistent with the congressional command, and of certain character, even though it be neither so expeditious or convenient as some other sought to be substituted which circumvents that command. To this of course should be added the further qualification that following the prescribed remedy, upon the showing made, will not certainly or probably result in the loss or destruction of substantive rights.

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plicable to the latter, notwithstanding the power of Congress to regulate the jurisdiction and procedure of the federal courts may present obstacles to its application not present in state cases.

This brings us to consideration of the showing made here in support of equity's intervention. That showing, we think when considered in the light of the foregoing principles and of the statute's clear purpose and intent is not sufficient.

Whatever may be the scope allowed generally for equity to intervene upon the ground of inadequacy of legal remedies, where no explicit congressional command exists for following a prescribed procedure, the problem when such a mandate is present is entirely different from one tendered in its absence. The very fact that Congress has made the direction must be cast into the scales as against the factors which, without that fact, would or might be of sufficient weight to turn the balance in favor of allowing utilization of equity's resources. That fact itself may be of such weight as to turn the scales the other way, even in situations much more doubtful than the present one. In short, the so-called general principles governing the exercise of jurisdiction in equity are not to be taken, in such a case, as isolated from all effect of the legislative mandate or necessarily or even readily as overriding it.

In the first place, there can be no doubt of the availability or indeed of the certainty and effectiveness of appellant's remedy at law by suit upon its contracts against its customers claimed to owe it money under those agreements. Suits of that character are not forbidden, either expressly or impliedly by the Renegotiation Acts. Nor are they made dependent upon completion of the Tax Court proceedings.[39] Moreover we know of no reason

[39] It is unnecessary to consider whether in such a suit a district court should find it proper to defer its final decision until after the Tax Court had made its final redetermination, in order possibly to avoid the necessity of deciding the constitutional questions. Cf. *American Federation of Labor* v. *Watson*, 327 U. S. 582, 599, and cases cited. For, even in the event of such action, the court would have power to preserve, pending the administrative decision, the *status quo* and all

why every question of constitutionality which has been raised in this suit could not be presented and determined in such a suit.

In addition, there is special reason in the statutory provisions why that course should be followed rather than allowing the present suit. Appellant is, as we have pointed out, a subcontractor, not a contractor with the Government. While its suit could be instituted directly only against the contractor with whom it had dealt, nevertheless it is hardly conceivable that the Government would permit the suit to go to final judgment without intervention by it or, at the least, undertaking the responsibility for making the defense. For by § 403 (c) (2)[40] it is expressly provided: "Each contractor and subcontractor is hereby indemnified by the United States against all claims by any subcontractor on account of amounts withheld from such subcontractor pursuant to this paragraph."

In the face of this indemnity, the contractor becomes substantially a stakeholder as between the Government and the subcontractor, and the latter's suit against the contractor, if terminated favorably to the complainant, would obligate the Government to indemnify or reim-

rights of the appellant. The provision in § 403 (c) (1) that the filing of a petition with the Tax Court "shall not operate to stay the execution of the order of the [War Contracts Price Adjustment] Board" under § 403 (c) (2) does not mean that the courts are deprived of their power to grant stays where necessary. "Where Congress wished to deprive the courts of this historic power, it knew how to use apt words. . . ." *Scripps-Howard Radio* v. *Federal Communications Commission*, 316 U. S. 4, 17. It did so in the Emergency Price Control Act of 1942, 56 Stat. 23; see *Yakus* v. *United States*, 321 U. S. 414, 429, 437, using very explicit language. Here the provision literally at any rate appears to mean only that there shall be no automatic stay by virtue of filing the petition in the Tax Court.

[40] The paragraph covers withholding payment pursuant to direction by the Board to the contractor, for the account of the United States. See note 13 *supra*.

burse the contractor for the liability thus incurred. In effect, the Government has consented to suit by the contractor in the Court of Claims on account of any liability the contractor incurs by virtue of lawful payment of the subcontractor's claims.

Accordingly, there would seem to be no substantial reason for regarding the suit against the contractor as inherently inadequate or ineffective for the protection of any rights of the appellant, including constitutional ones. In this respect the case stands identically with *Coffman v. Breeze Corporations, supra.*[41] If any such inadequacy exists, it must be by virtue of factors extraneous to the nature of the suit itself and not present in the *Coffman* case.

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[41] The situation of the licensor in the *Coffman* case, with reference to the remedy by suit against its licensees was exactly the same as appellant's situation here in respect to suit against its customers, the contractors with the Government. We said, as to the adequacy of that remedy: "But whether the provisions of the Act be valid or invalid appellant shows no ground for equitable relief. If valid they would be a defense, and appellant would be entitled to no relief other than that afforded by the suit against the Government authorized by § 2 of the Act. If invalid, appellant's right to recover remains unimpaired. The sufficiency of the defense may be as readily tested in a suit at law to recover the royalties as by the present suit in equity to enjoin payment of the royalties into the Treasury. In either case appellant would receive all the relief to which it shows itself entitled." 323 U. S. at 323.

The *Coffman* decision stood squarely upon the grounding of the adequacy of the remedy by suit against the licensees, although it rested also upon the alternative ruling that there was no case or controversy. This was for the reason that the appellant asserted no right to recover the royalties, but asked only a determination that the Royalty Adjustment Act was unconstitutional "and, if so found, that compliance with the Act be enjoined, an issue which appellee . . . declines to contest." This, we said, made the prayer of the bill "but a request for an advisory opinion as to the validity of a defense to a suit for recovery of the royalties." 323 U. S. at 323, 324.

These appellant seeks to establish in its showing relating to multiplicity of suits and irreparable injury. Apart from multiplicity, the showing concerning injury certainly would not be sufficient to justify eliminating the Tax Court proceeding.[42] Boiled down, the allegations come to appellant's assuming, for the period necessary to secure either the Tax Court's decision or final judgment in suits against its customers directed to withhold, the continued risk of their solvency, without specific allegation that any of them is seriously so threatened or facts to support such a claim; and to deprivation, for the same period, of the use of $270,000 directed to be withheld.[43] We do not think this showing alone without regard to multiplicity, approaches what would be required to sustain the interven-

[42] It is alleged that appellant, unless allowed to maintain this suit, will be caused unnecessarily to run the risk of impaired credit or insolvency of customers directed to withhold funds; that its working capital essential to carrying out its obligations with contractors and subcontractors would be reduced; that its operations "will be hampered and its functions irreparably damaged by the reduction of its working capital"; and that it will be forced either to continue supplying customers directed to withhold payment, impairing its assets and the interests of stockholders or, in the alternative, to refuse making such shipments with the asserted consequence of being unable to continue in business, "inasmuch as a substantial portion of its market for its products presently is prime contractors with the United States and subcontractors thereof."

[43] Appellant also alleges that it "could not recover interest for the use of its money" in a suit against the United States in the Court of Claims, which on other counts it asserts is both unavailable and inadequate. There is no allegation, however, concerning interest as not being recoverable in suits against its customers. And, as we have pointed out above, the statutory indemnity provided for such contractors is in sufficiently broad terms to cover interest as well as any other liability incurred by them through authorized withholding, a guaranty which certainly would not preclude recovery of interest by the suit against the contractors if terminated on the merits in appellant's favor.

tion of a court of equity, particularly in order to avoid or anticipate the congressionally authorized proceeding.

Nor, in the facts of this case, is the showing made concerning multiplicity of suits sufficient for that purpose. Appellant's case as made in this feature is that it would be forced to sue some sixteen "or more" customers, in various and scattered jurisdictions, with consequent expense of litigation and "resultant ill-feeling and irreparable injury" to good will and appellant's business. On the other hand stands the affidavit of appellee Hirsch that direction for withholding and payment into the Treasury will not be needed or given in more than two or three instances, and in case any balance should remain it will be collected through suit instituted by the Government.

Whether the District Court accepted one version of the facts or the other, it found there was no sufficient basis in the claim of multiplicity to sustain equity's assumption of jurisdiction. We would not be disposed to override that judgment of the trial court, turning as much as it may upon questions of fact.[4]

Moreover, it is not apparent, at any rate from the allegations, why it would be necessary for appellant to sue all of the sixteen customers or indeed perhaps more than one of them in order to secure a determination of its constitutional rights or preserve its rights. A single test suit would serve the former purpose fully, and there are no allegations of fact sufficient to show that appellant's

[4] It is perhaps of some significance in this respect that the complaint contains allegations, though not made in this connection, relating to both the fiscal years 1942 and 1943 to the effect that over 80 per cent of the dollar value of appellant's total shipments were made to three private concerns, Fairchild Engine and Airplane Corporation, General Motors Corporation, Woodward Governor Company, and the United States Navy. Concerning the shipments to the Navy, see note 8.

rights of recourse against others probably would be lost by awaiting the outcome of such a suit, either legally through the operation of statutes of limitations or practically, as we have said, through any probable incidence of insolvency.

In the absence of either kind of showing, the injury appellant seeks to avoid by the argument of multiplicity actually comes down, as we have said, to deprivation of the use of the amount withheld for the period required for completion of the Tax Court proceedings or a test suit against a customer. Whether or not there will be any injury in this limited respect depends of course, first, on the outcome of the Tax Court proceedings, particularly in relation to the matters of coverage; second, on whether, upon the assumption that those proceedings sustain the Government's claim as to all or part of the $270,000, the amount thus found due is finally held, in authorized litigation, to be due and owing to the appellant or to the Government. And; as we have also said, if that result should favor the appellant, the Government's obligation to indemnify the contractor would be, in effect, indirectly available to appellant to indemnify it for any loss of the use of the moneys withheld.[45]

Whatever might be true in other circumstances, this showing as to the necessity for suing many customers is hardly sufficient to justify the substitution of equity's extraordinary relief for what in all the conditions of this case appears to be a full, adequate and completely available remedy at law. *Coffman* v. *Breeze Corporations, supra; Macauley* v. *Waterman S. S. Corp., supra.*

Indeed the argument of multiplicity, with others, was expressly advanced and rejected in the *Waterman* case, as ground for not applying the *Myers* rule and for sustaining declaratory and equitable intervention to circumvent it.

[45] See note 43 *supra.*

After noting the company's claim, with others, that "it would be subjected to a multiplicity of suits in order to recover the money due on the contracts," we there said: "Even if one or all of these things might possibly occur in the future, that possibility does not affect the application of the rule requiring exhaustion of administrative remedies. The District Court had no power to determine in this proceeding and at this time issues that might arise because of these future contingencies." 327 U. S. at 545.

This case is perhaps even stronger than the *Waterman* case for application of the *Myers* rule. For here the appellant is a subcontractor retaining what the contractor complainant did not have in the *Waterman* case, namely, a completely adequate remedy at law against its customers, buttressed by the Government's guaranty of indemnity to the contractor for all liability incurred by him on account of withholding funds allegedly due the appellant.

In view of that fact the further one that constitutional issues are included among those tendered in this case but were not presented in the *Waterman* case, becomes wholly immaterial. To countenance short-circuiting of the Tax Court proceedings here would be, under all the circumstances but more especially in view of Congress' policy and command with respect to those proceedings, a long overreaching of equity's strong arm.

The judgment is

Affirmed.

MR. JUSTICE JACKSON concurs in the result.

MR. JUSTICE DOUGLAS dissents.